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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

THE UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

APPALACHIAN ELECTRIC POWER COMPANY,
*Respondent.*

## BRIEF FOR RESPONDENT.

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August 31, 1940

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

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THE UNITED STATES OF AMERICA,
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APPALACHIAN ELECTRIC POWER COMPANY,
*Respondent.*

---

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT

On March 4, 1940, this Court granted certiorari to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit, affirming a final decree of the United States District Court for the Western District of Virginia dismissing the Amended Bill after an exhaustive hearing on the merits (R. 2943, 157-8). The Bill sought a mandatory injunction requiring respondent to take a major license under the Federal Water Power Act for the construction of its hydro-electric project in New River near Radford, Virginia,[1] or in the alternative, to remove "all or any part of such project works which lie within the limits of New River" (R. 4-20).

[1] Hereinafter sometimes referred to as "the Radford project."

## Opinions Below

The opinion of the District Court (R. 101-154) is reported in 23 F. Supp. 82. The opinion of the Circuit Court of Appeals (R. 2880-2922) and the opinion of the dissenting judge (R. 2922-42) are reported in 107 F. (2d) 769.

## Jurisdiction

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

## Statutes Involved

The Bill of Complaint alleged, as separate grounds or causes of action, violations of sections 9 and 10 of the Rivers & Harbors Act of March 3, 1899 (30 Stat. 1151), and of Section 23 of the Federal Water Power Act of 1920 (41 Stat. 1063).

1. *Rivers & Harbors Act of March 3, 1899.* Section 9 of that Act prohibits the construction of a dam across a navigable water of the United States without the consent of Congress. Section 10 of that Act prohibits the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States.

2. *The Federal Water Power Act of 1920.* This Act did not prohibit anything but merely provided a more convenient means of granting and obtaining federal assent (in certain of the cases where required under the Rivers & Harbors Act of March 3, 1899,) than by special act of Congress. Section 4(d) of the Federal Water Power Act authorized the Federal Power Commission to issue a license for the construction of a project which is located *in navigable waters of the United States.* This was the only grant of licensing power in the Act. Section 10(c) provided

that the project shall not impair navigation. The Act also provided that a standard-form or major license issued thereunder should contain all of the conditions prescribed by the Act and such other conditions not inconsistent with the Act as the Commission might in its discretion impose (sec. 10).

Such licenses could be issued for not more than fifty years and were required to include, *inter alia*; the following conditions: the project shall be best adapted to a comprehensive scheme of improvement of navigation, water power and "other beneficial public uses"; the project shall be adequately maintained for purposes of navigation and the efficient "development and transmission of power"; the licensees shall maintain adequate depreciation reserves and "shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property"; amortization reserves shall be maintained out of earnings in excess of a reasonable return upon the net investment as specified by the Commission and shall be applied, immediately or ultimately (in the discretion of the Commission), to the reduction of net investment; excessive profits as defined by the Commission shall be expropriated by the United States unless and until expropriated by the respective States; the project of the licensee may not be sold or leased without approval of the Commission (sec. 10, 3, 8; Ex. 131, R. 2673).

Section 14, the "capture clause",[1] authorizes the United States to "take over, maintain and operate" the power

[1] This clause is sometimes called the "recapture" clause and petitioner so refers to it (Pet. Br. 136-143). "Recapture" is a weasel word. It implies the retaking or reclaiming of something owned by the recapturer and of which he had theretofore merely temporarily surrendered possession, or, as it were, a right of reverter. But in fact, "recapture" is a euphonism for taking property for public use without just compensation. The Act does not use this word, but describes the process as "taking over" the property of the citizen and in the same section carefully distinguishes the right of the United States, a state or municipality to acquire the property by condemnation (for a constitutional purpose) "upon payment of just compensation".

project at the end of the 50-year license period for "net investment" in dollars or the *then* fair value *whichever is the less;* and "net investment" is subject to diminution by deduction of amortization reserves, unappropriated surplus, current depreciation accounts and sinking funds and by the expropriation of excess profits as defined by the Commission (sec. 14, 3).

Section 10(i) authorizes a minor-part license under which the Commission may waive any or all conditions except the 50-year term in a license for a minor part of a complete project.

Section 23 (second paragraph), in the view of respondent, authorized anyone intending to construct a project on a stream of doubtful navigability to file in his discretion a declaration of such intention and obtain a preliminary determination whether the stream is navigable. If upon investigation the stream were found to be a navigable water of the United States, such declarant was prohibited from proceeding without a license issued under section 4 of the Act, but otherwise might, of course, construct his project upon compliance with state laws.

8. *The Federal Power Act of 1935.* Subsequent to the filing of the instant suit the Congress, by the Act of August 26, 1935 (49 Stat. 838-863), incorporated the Federal Water Power Act, with minor (and we believe immaterial) amendments, as Part I of an otherwise new statute which deals with additional subjects and is entitled the Federal Power Act. Part I of the Federal Power Act (the old Federal Water Power Act) was entitled "Regulation of the Development of Water Power Resources." Part II of the new statute deals with the "Regulation of Electric Utility Companies Engaged in Interstate Commerce" and Part III with procedural and administrative provisions applicable to licensees and public utilities, Title 16 U. S. C. (Conservation) Ch. 12.

By the Act of August 26, 1935, section 4 (d) of the Federal Water Power Act (the grant of licensing power)

was renumbered section 4(e) and the phrase "navigable waters of the United States" was changed to read "streams over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States." In the view of respondent, this change in phraseology did not enlarge the grant of licensing authority and that authority, as before, is limited to projects in navigable waters.

The second paragraph of section 23 of the Federal Water Power Act became section 23(b). It was amended to add an initial sentence declaring unlawful projects built at government dams, on public lands or reservations and in "navigable waters of the United States" where constructed without a license from the Commission, if built since June 10, 1920, or where constructed without other federal authorization if built prior to June 10, 1920. It was also amended so as to make the filing of a declaration of intention mandatory. In the view of respondent, neither of these amendments, if applicable, affects, or was intended to affect, the meaning of the Federal Water Power Act in so far as it is claimed to be applicable in the case at bar.

The Bill of Complaint, asserting an alleged cause of action for violation of the Federal Water Power Act of 1920, was never amended to assert any violation of the Federal Power Act.

## Statement of the Case.

### A. General Description of the New and Kanawha Rivers.

New River, which is approximately 341 miles in length, rises in the mountains of northwestern North Carolina at an elevation of approximately 3800 feet. It enters Virginia in Grayson County where it is almost immediately joined by Wilson Creek. From this junction New River flows northeasterly for approximately 125 miles until it reaches a point shortly below Radford, Virginia, where it abruptly

turns northwesterly and, breaking through the mountain ranges, flows in that general direction until near Gauley Bridge, West Virginia, it joins with the Gauley River at an elevation of 642 feet to form the Kanawha River. (R. 106-7.) The average fall of New River between Wilson Creek and its mouth is 7.1 feet per mile. (R. 107.) It crosses the Virginia-West Virginia State line at Wiley's Falls (mile 89 above the Kanawha). (R. 2909, 2938.) The Kanawha River, which has an average slope of only 1.25 feet per mile, flows in a northwesterly direction for approximately 96 miles to Point Pleasant, West Virginia, where it empties into the Ohio River. (R. 107.) While navigability of the Kanawha River in a state of nature above Kelly's Boat-yard (just above the present site of Charleston, West Virginia) is doubtful (*Ex.*[1] *245*, p. 76), respondent conceded and the District Court found that the improved Kanawha River is now navigable from its mouth to a point 7 or 8 miles below its head at the junction of the New and Gauley Rivers. (R. 155.)

Between 1877 and 1889, the Federal Government attempted to create an artificial channel, relatively shallow and narrow, in three widely separated local stretches of New River, to wit: the lower one extending upstream from Hinton, West Virginia; the intermediate one extending upstream from New River Bridge near Radford, Virginia, and separated from the Hinton or lower stretch by some 60 miles of river where no federal improvement was even attempted; and the upper one extending for about eight miles between Lead Mines, Wythe County, Virginia, and Gulf in Carroll County, Virginia, separated from the intermediate stretch by about 14 miles. (R. 112-3.) While temporarily stimulating some local use immediately above the railroad stations at Hinton, W. Va., and Radford, Va., respectively, the attempted improvement proved to be of little or no value even locally. Otherwise the river is in its natural condition.

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[1] Where citation is to an unprinted original exhibit or to an unprinted portion of an exhibit, the citation is italicized—thus, "*Ex.*"

No appropriations were made after 1886; and the dormant authorization for the project was formally repealed by Congress in 1902. The purpose of this meager federal work was, not to make a continuous navigable waterway out of the river, but only to provide local access to railroads. (Ex. 47, R. 2427, 2441; 514.)

**B. Location and Description of Radford Project.**

The Radford project is located in New River, a few miles above Radford, Virginia, approximately 160 miles above the head of navigation on the Kanawha River and approximately 170 miles above the London Dam, the upstream Government dam on the Kanawha River. (R. 156.) It does not involve the use of any land or other property of the United States. (R. 154, 156.)

The Radford project consists of a concrete dam with an overall height of 130 feet, a reservoir with a usable drawdown of 27 feet and utilizable storage capacity of 100,000 acre-feet and electric generating machinery with a maximum hydraulic capacity of approximately 9,000 c.f.s.[1] (R. 128, 2904.) The natural low water flow in an extremely dry year at the Radford site is about 600 c.f.s. By impounding flood waters for release during the low water season, the construction and operation of the Radford project will increase the average regulated low-water flow at the damsite to 1,230 c.f.s. in an extremely dry year. (R. 1321.) It will correspondingly increase the average low-water flow in average and good water years.

Many years ago (by a project adopted in 1875) 6-foot navigation had been created on the Kanawha River by the construction of 10 low navigation dams (8 of the wicket type and 2 of the crib type). (*Ex. 144*, R. 848.) By 1925 these old dams were obsolete and in a very serious state of dilapidation and disrepair so that their continued use was impossible without reconstruction or very extensive re-

[1] In the interest of brevity the abbreviations "c.f.s." "a.f." "sec. ft." are used for the term "cubic feet per second".

pairs (*Ex. 509*, R. 1833; R. 751-7.) Thereafter Congress adopted a new 9-foot navigation project on the Kanawha River and constructed new roller type navigation dams in the Kanawha River at London, Marmet and Winfield, W. Va., and a dam of similar type in the Ohio River at Gallipolis just below the mouth of the Kanawha River. Power plants have been constructed by a private licensee at the London, Marmet and Winfield dams on the Kanawha River. The hydraulic capacity of the power generating machinery installed at London, Marmet and Winfield under licenses issued by the Federal Power Commission is approximately 9,000 c.f.s., the same as at the Radford project. The low-water flow at these dams is approximately 1,000 to 1,100 c.f.s. (without deducting water used for navigation and hence not available for power) in comparison with the average regulated low-water flow of 1230 c.f.s. which will be produced by the Radford project at its site. (R. 1321; 1012-3.)

The Buck and Byllesby hydro-electric plants of respondent were constructed in New River some miles above the Radford project about 1912 and have operated continuously since that time. About four years ago, the Electro-Metallurgical Company completed a hydroelectric development in the New River at Hawksnest, about 13 or 14 miles above the head of navigation on the Kanawha River. (R. 2906.) All of the last three named plants were constructed and have been operated throughout without a federal license; and none contains any lock or navigation facilities.

Petitioner has instituted condemnation proceedings to acquire lands for the construction of its Bluestone Reservoir in the New River, a few miles above Hinton, West Virginia, and about 85 miles downstream from the Radford project. According to the plans, the Government Bluestone project will consist of a concrete dam with a height of 150 feet, a utilizable power storage of 245,000 acre-feet, electric generating machinery with a maximum hydraulic capacity of 11,000 c.f.s. and a superimposed flood reservoir with a

height of 35 feet and flood storage of approximately 268,000 acre-feet. (R. 131-2.) Like all other dams on New River, the plans for this Government Bluestone dam, contrary to petitioner's assertion (Pet. Br. 86), do not provide for any lock or other facilities for navigation. See p. 43, *infra*.

**C. Prior Proceedings—Background of the Litigation.**

On June 26, 1925, a Declaration of Intention to construct, operate and maintain the Radford project was filed with the Federal Power Commission under Section 23 of the Federal Water Power Act by a predecessor of respondent for the purpose of obtaining a determination, in accordance with the plain facts, that the project was not subject to the jurisdiction of the petitioner. (Ex. 88, R. 2469, 589.) Subsequently the Declaration was assigned to, and adopted by, respondent. (R. 136-7, 2883-4.) Pending action upon the declaration, respondent at the suggestion or request of the Commission, filed an application for a license for said project "upon the understanding that such application can be withdrawn if it should develop that a Federal license is not required." (R. 19-20; Ex. 568, R. 2849, 1827; Ex. 102, R. 2624, 602; R. 2884.) Also pending action upon the declaration, a field-hearing was had by the Army District Engineer upon this application which (notwithstanding petitioner's unsupported assertion in Pet. Br. 9) concededly constituted no part of any investigation under the Declaration. (R. 611-2, 733, 760; Ex. 101, R. 2604, 600.)

At the only public session (March 2, 1926,) of the Commission in connection with its investigation[1] under the

[1] It is desired to bring to the attention of the Court that certain exhibits were offered and received in evidence in this case for limited purposes only. Some of these exhibits have been referred to by petitioner without reference to any limitation (Pet. Br. 13). The greater number of such exhibits were received solely for the purpose of showing the nature of the alleged investigation made by the Federal Power Commission, or for the purpose of showing the course of conduct between respondent and appellant, or the

(*Footnote continued on next page*)

declaration, the only evidence offered or received was the report of the Chief of Engineers that New River was not navigable and that *it would not be possible* so to operate the project as *to impair* the navigable capacity of navigable waters.[1] (R. 138, 2884; *Ex. 572,* R. 1834; Ex. 97, R. 2527, 597.) Nevertheless, on June 1, 1927, the Commission, while finding "that New River in the part thereof involved in said declaration of intention is not 'navigable waters' within the definition of said Act (Federal Water Power Act)", also purported to find "that the interests of interstate or foreign commerce would be affected by such proposed construction." (Ex. 91, R. 2483, 2492-4, 591.) On July 1, 1927, the Commission tendered a major license to respondent. (Ex. 130, R. 2650, 768.) Respondent declined the license but, while denying any jurisdiction in the Commission or petitioner, offered to accept all of the conditions of the tendered license regulatory of the flow through the power house or over the dam having any relation to the alleged protection, no matter how unnecessary, of the navigable capacity of navigable waters. (Ex. 91, R. 2483, 2496-9, 2499-2506, 591.)

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position of, intent of, and action taken by respondent with respect to its project. The following is a list of certain (not necessarily all) exhibits received for limited purposes: printed exhibits nos. 91 (R. 2483, 591); 94 (R. 2524, 594); 97 (R. 2528, 597); 99 (R. 2556, 599); 100 (R. 2584, 599); 101 (R. 2604, 600); 103 (R. 2625, 603); 104 (R. 2626, 604); 105 (R. 2628, 604); 106B (R. 2635, 605); 530 (R. 2762, 1830); 541 (R. 2796, 1832); 545 (R. 2806A, 1498); 548 (R. 2812A, 1673); 550 (R. 2813, 1725); 568 (R. 2849, 1827); 569 (R. 2850, 1827); 570 (R. 2850, 1827); 571 (R. 2851, 1827); 581 (R. 2865, 1832); 586 (R. 2868, 1833); 588 (R. 2871, 1833); and original but unprinted exhibits nos. 1 (R. 185); 95 (R. 596); 106, 106A, 106C (R. 605); 196 (R. 1242); 201 (R. 1354); 202 (R. 1354); 558A-G (R. 1776); 580 (R. 1832); 589 (R. 1833); 590 (R. 1833).

[1] In the interests of brevity and unless otherwise expressly stated, the term "navigable waters" is used herein to mean "navigable waters of the United States" and the terms "impairment of navigable waters" and "impairment" are used herein to mean "impairment of navigable waters of the United States".

Consistently denying any jurisdiction in the Commission or petitioner, respondent on February 4, 1930, applied for a minor-part license under section 10(i) of the Act, containing only such conditions as would have a real and substantial relation to the protection of navigation or navigable capacity. (Ex. 529, R. 2760, 1830; 2885, 139.) Thereafter the Federal Power Commission certified to the Attorney General of the United States that "New River is neither navigated nor navigable in fact" (Ex. 531, R. 2779, 1831; 2885) and on September 22, 1930, the Attorney General rendered an opinion that the Commission had authority under the Act to issue such minor-part license for the project and that any attempt to impose any broader license would raise grave constitutional questions (Ex. 532, R. 2781, 1831, 2885, 139). On November 6, 1930, the Executive Secretary of the Commission forwarded to respondent a preliminary draft of a minor-part license (Ex. 537, R. 2789, 1831). Respondent formally offered to accept such minor-part license (Ex. 542, R. 2806, 1831; 2886).

However, suddenly the Commission advised respondent that on November 25, 1930, it had determined to take no action, favorable or adverse, on the application for a minor-part license because, in view of the questions of jurisdiction between the United States and Virginia, a court adjudication was desirable. (Ex. 91, R. 2483, 2506-7, 591.) The Commission, on April 3, 1931, denied the application for a minor-part license and ordered respondent not to proceed with construction unless and until it agreed to accept a major license containing numerous burdensome conditions and restrictions having no relation to the putative protection of navigation on, or the navigable capacity of, the Kanawha River. (Ex. 91, R. 2483, 2509, 591; R. 139-40; 2886-7.)

On May 5, 1931, the Commission tendered the respondent such a major license which recited that the "maps, plans and specifications of said project" submitted by respondent had been approved by petitioner through its agents, the Chief of Engineers and the Secretary of War,

from the standpoint of navigation (as further appears from the endorsement on the plans themselves, *Ex. 90-A*, R. 590) and by its agency, the Federal Power Commission, as being "best adapted to a comprehensive scheme of improvement and utilization of said waters, for the purposes of navigation and interests of navigation and/or interstate or foreign commerce, of water power development, and other beneficial public uses." (Ex. 131, R. 2663, 768.) The Radford project is constructed at the location and upon the precise plans so approved. (R. 2027, 1244-5.)

This second tendered license (which is the license petitioner asked the court to require respondent to accept) contained *inter alia* precisely the same conditions (for the alleged protection of navigation) with reference to the regulation of flow through respondent's power house and over its dam as those contained in the draft of minor-part license which respondent had formally offered to accept. However, because of the capture clause and other burdensome conditions irrelevant to navigation, respondent declined this major license and sought a judicial determination of the controversy (*Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451), but the Court of Appeals found there was no jurisdiction.[1]

Having failed in its efforts to secure a judicial determination, respondent, under date of September 13, 1934, advised the Secretary of War that it had commenced construction without accepting a federal license, that for six years it had consistently expressed its willingness to accept

[1] It was after hearing but before final decision in the District Court, on the Commission's motion to dismiss the Bill in the above entitled suit, that the Commission at an executive session had on October 12, 1932, purported by resolution to reverse its previous finding of non-navigability of New River and to declare that New River is navigable from Wilson Creek to its mouth (Ex. 91, R. 2513-15, 591; Pet. Br. 13). As shown on the face of the resolution and as found by the lower courts (R. 140, 2912), the object of this *ex parte* action was to secure an advantage in the then pending litigation. No reliance was placed by petitioner on the foregoing resolution in the bill of complaint.

a federal license with conditions limited to the protection of navigation or of navigable capacity, that the project would not cause any impairment of navigable capacity but that the respondent would nevertheless abide by any orders of the Secretary of War regarding the construction and operation of the project and relating to the putative protection of navigation (Ex. 586, R. 2868, 1833; Ex. 588, R. 2871, 1833).

**D. Issues Raised by the Instant Suit and Their Disposition by the Courts Below.**

On May 6, 1935, the petitioner instituted this suit for a mandatory injunction requiring respondent to remove its dam and hydro-electric plant then under construction in the New River just above Radford, Virginia, or in the alternative to accept a major license under the Federal Water Power Act of 1920 (R. 4-38). The Bill asserted two alleged causes of action, to wit:

*First:* That under the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1151), the construction and operation of respondent's project without a federal license is unlawful

(a) under section 9 thereof, because New River is navigable in fact in interstate commerce, or

(b) if New River be not so navigable, then under section 10 of that Act, because the construction and operation of said project would substantially impair the navigable capacity of the Kanawha River, a navigable water of the United States, to which New River is tributary (R. 4-12).[1]

*Second:* That the construction and operation of respondent's project in New River without a standard-form or major license under the Federal Water Power Act of 1920 is unlawful under the Act

[1] Contrary to the assertion in Petitioner's Brief p. 14, the Bill did not allege that the project would impair the navigable capacity of the Ohio River (R. 4-18). However, the evidence established and both lower courts expressly found that the respondent's project will not impair the navigable capacity of the Kanawha River or of "any navigable water of the United States" (See pp. 15-16, infra).

(a) because New River is navigable in fact in interstate commerce, or

(b) if New River is not so navigable, then because respondent's project will substantially impair the navigable capacity of the Kanawha River and thereby affect the interests of interstate commerce (R. 13-15).[1]

It will thus be seen that, while two alleged causes of action were asserted upon the basis of different statutes, both alleged causes of action depended upon the same issues of fact. They were:

(a) Is New River navigable in fact in interstate commerce?

(b) If New River is not navigable in fact in interstate commerce, will the construction and operation of the Radford project substantially impair the navigable capacity of the Kanawha River?

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[1](a) As a condition precedent to bringing any suit under this Act, the Bill alleged that the Commission had made a finding (which was merely in the words of the statute) "that the interests of interstate or foreign commerce would be affected by the proposed construction" (R. 14; 2853) and this alleged cause of action was sought to be supported in the courts below upon the theory that such alleged finding was conclusive. This theory was rejected by both lower courts (R. 149-52; 2910-12) and has been abandoned on certiorari (Pet. Br. 14, footnote 10, Pet. for Cert. 16). The Bill, relying upon the alleged navigability of New River, alleged that respondent's project "would affect the interests of interstate commerce on the New and Kanawha Rivers" (Bill, par. 23, R. 14). However, when the evidence established and the lower courts found that New River is not navigable, the issue of impairment was narrowed, under the allegations of the Bill, to the Kanawha River.

(b) In the Court of Appeals, petitioner for the first time advanced the theory "that effect upon interstate commerce" under the Power Act includes matters unrelated to navigation or navigable capacity. While this theory, rejected both by the lower court and the dissenting judge (R. 2909-14, 2924), is now abandoned (Pet. Br. 18-19; 103, footnote 30), it may be noted that no "effect upon interstate commerce" unrelated to navigation was alleged in the Bill (R. 11-17) and that petitioner's requested findings did not relate to any other type of alleged effect upon interstate commerce. (R. 94-8; See footnote, pp. 85-6, *infra*.)

The answer, *inter alia*, denied that New River is navigable in fact in interstate commerce; denied that the construction and intended operation, or any form of operation physically possible, will or could impair the navigable capacity of any navigable water; alleged that the respondent had full and complete proprietary right under the laws of Virginia to construct and operate the project; alleged that, if either statute be construed as conditioning or restricting the exercise of respondent's proprietary rights, each is to that extent unconstitutional; averred that, if any license could be required for the construction or operation of the project (which respondent denied), its conditions must be limited to those related solely to the protection of navigation or navigable capacity and that, if a license be necessary, the refusal of petitioner to grant respondent a federal license unless respondent would agree to be bound by unconstitutional conditions and restrictions, would constitute a taking of respondent's property without due process of law in violation of the Fifth Amendment and would bar petitioner from the relief sought; and averred that the Bill does not allege any acts, statement or threat of respondent to do anything which would impair navigable capacity of navigable waters (were that physically possible in the circumstances which respondent denied) but merely alleges a hypothetical or moot case. (R. 38-67.)

After an exhaustive hearing,[1] the District Court found (1) that New River is not a navigable water of the United States, "either at the site of defendant's project *or* else-

[1] The hearing of evidence commenced on July 11, 1936, and extended continuously through September 5, 1936. More than 135 witnesses testified and more than 360 exhibits were introduced in evidence. The evidence, exclusive of voluminous exhibits, occupied over 7,000 pages of transcript. On December 30, 1936, the petitioner filed a printed brief of 559 pages and respondent filed separate printed briefs on fact and law totaling 254 pages. Thereafter the District Court heard three days of oral argument. Subsequently supplemental briefs totaling 444 pages were filed with the District Court. Both parties filed requests for findings of fact and conclusions of law.

*where throughout its course*" (R. 126, 155-6);[1] (2) that neither the construction nor operation of respondent's project will obstruct or impair the navigable capacity "of the Kanawha River or *any navigable water of the United States and will not affect the interests of interstate commerce*" (R. 156, 133, 134, 153);[1] and (3) thereupon concluded that the petitioner had established no cause of action under either the Rivers & Harbors Act of March 3, 1899, or the Power Act and issued a decree dismissing the Bill. Although unnecessary, the District Court observed that the petitioner would not be barred if any material change in facts should occur in the future. (R. 153.)

The Court of Appeals carefully reviewed, and independently weighed, the evidence and reached the same conclusions of fact as the District Court and thereupon affirmed the findings made by the District Court. (R. 2893, 2900, 2903, 2904-8.)

The States of Virginia and West Virginia appeared as *amici curiae* in both courts below and by their respective Attorneys General filed briefs in opposition to petitioner's contentions. Each State contended, among other things, that New River is not navigable and is not subject to the asserted jurisdiction of the Federal Power Commission.

Having found (a) that New River is not navigable in fact in interstate commerce and consequently not a navigable water of the United States, and (b) that neither the construction nor the operation of respondent's project will impair the navigable capacity of any navigable water of the United States and consequently will not affect the interests of interstate commerce, the Court of Appeals also held that neither the Rivers & Harbors Act of March 3, 1899, nor the Federal Water Power Act is applicable and *a fortiori* no cause of action had been established under either Act. Neither statute nor any part thereof was adjudged uncon-

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[1] Petitioner omits the italicized portion of these findings from its summary of the decision of the District Court. (Pet. Br. 16.)

stitutional, and upon the facts so found neither Act is applicable.

That the lower courts were correct in so holding upon these facts is, we think, conceded. In the Court of Appeals the petitioner expressly stated:

> "If New River is not a navigable water of the United States, and if the project in question will not diminish the navigable capacity of a navigable water of the United States, then the Act (Rivers & Harbors Act of March 3, 1899) is not applicable and therefore, no constitutional question is involved." (Pet. Supp. Br. in C. C. A., p. 236.)

And further:

> "If, upon the facts, New River is not navigable water of the United States within the meaning of the Federal Power Act, and the project will not affect the interests of interstate or foreign commerce, then the Federal Power Act is not applicable and no constitutional questions need be considered." (Pet. Supp. Br. in C. C. A., pp. 236-7.)

## The Nature and Scope of the Questions Presented in this Court.

The issues sought to be presented by petitioner in this Court are essentially issues of fact; that is, unless the findings concurred in by the two lower courts are set aside, no substantial question of law arises. Findings of fact concurred in by two lower courts will be accepted as unassailable in this Court if supported by substantial evidence. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477; *Brewer-Elliott Co.* v. *United States*, 260 U. S. 77, 86. Nevertheless, petitioner's statement of the questions presented (Pet. Br., 2) and its entire argument disregard the findings concurred in by the lower courts; in effect petitioner asks this Court to examine the evidence *de novo* and, sitting as a Court of first instance, to make a new and independent determination of the factual issues.

Petitioner does not attempt to show that these findings concurred in by both lower courts are not supported by substantial evidence but, in effect, merely argues that there was some conflicting evidence—and that argument is advanced without reference to the mass of testimony which squarely supports these findings. This manifestly presents no issue of law for this court. See p. 31, *infra*.

In our opinion, the only questions presented are:

*First:* Is the finding, concurred in by both lower courts, that New River is not navigable in fact in interstate commerce either at respondent's damsite or at any other point in its course, supported by substantial evidence?

*Second:* Is the finding concurred in by both lower courts, that neither the construction nor operation of respondent's project will substantially impair the navigable capacity of any navigable water of the United States or affect an interest of interstate commerce, supported by substantial evidence?

*Third:* Does the Rivers & Harbors Act of March 3, 1899, or the Power Act purport to require a federal license for the construction of a project which is located on a non-navigable stream and does not impair navigable capacity?

The findings of the lower courts upon questions First and Second are supported by substantial evidence and are unassailable here. Upon the facts so found, both statutes are so plainly inapplicable to respondent's project that no question of their construction or interpretation arises. It follows that the decision of any further questions is neither necessary nor permissible in this case. Nevertheless, petitioner also seeks to present the following questions:

1. Is the (allegedly navigable) intrastate stretch of New River between Allisonia and Radford, Virginia, a navigable water of the United States if some part of a small quantity of charcoal-iron which was

boated over this stretch during a few months, approximately 60 years ago, was, after an intermediate transportation by wagon, shipped on an interstate railroad?

2. In the case of a project located on a non-navigable stream, does a beneficial effect upon navigation or navigable capacity, no matter how indirect, incidental or inconsequential, confer upon petitioner authority to require a license for respondent's project under the Power Act?

3. Does the United States have constitutional authority to require a federal license for a project which is located on a non-navigable stream and does not impair navigable capacity of navigable waters?

4. Does the United States have constitutional authority to impose license conditions unrelated to the protection of navigation or navigable capacity in the case of a project (a) in a non-navigable stream, or (b) in a navigable stream?

Question No. 1, were it otherwise presented, has no substantial basis in fact and is erroneous in law.

Question No. 2 was not raised by the pleadings or in the trial court and would not be open to petitioner in any event; but, even if it were, it is unsound as a matter of construction of the Power Act and, were that Act so construed, the Act would be in excess of petitioner's constitutional authority.

Questions 3 and 4 are plainly moot under the statutes invoked as applied to the facts of this case; but, were these questions presented, the answer to each of them would be in the negative.

## SUMMARY OF ARGUMENT

### I.

The courts below adopted and applied the definition of navigable waters which has been consistently adhered to by this Court since it was first enunciated in *The Daniel Ball*, 10 Wall. 557. If, as petitioner asserts, Section 3(8) of the Federal Power Act is simply "a codification of the criteria" of navigable waters enunciated by this Court, petitioner may not assert that the lower courts erred in adopting the definition of navigability promulgated and consistently adhered to by this Court. However, federal navigability is a constitutional fact; and if this statutory definition were construed to include waters not navigable in fact in interstate commerce, it would manifestly be unconstitutional and void. *United States* v. *Cress*, 243 U. S. 316, 322; *Crowell* v. *Benson*, 285 U. S. 22, 55. If, as we believe, this statutory definition is somewhat narrower than the judicial and constitutional definition of navigable waters, manifestly petitioner may not complain because the lower courts adopted and applied a broader definition of navigable waters than that prescribed by the statute upon which petitioner relies.

The finding, concurred in by the lower courts, that New River is not navigable in fact in interstate commerce either at respondent's damsite or elsewhere in its course is supported by substantial evidence and is unassailable here. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477; *Brewer-Elliott Co.* v. *United States*, 260 U. S. 77, 86.

The physical characteristics of the river, the actual conditions encountered in the limited federal work undertaken in the most easily improved short local stretches of the river, *Oklahoma* v. *Texas*, 258 U. S. 574, the absence of any use where land travel was so difficult as to have compelled the use of any feasible water transportation no

matter how difficult, the testimony of expert and informed witnesses, comparisons with other streams such as the Kanawha, Colorado, Fox, Desplaines and Tennessee, the progress reports of the Engineers in charge of the federal work, the proven impracticability of boating charcoal-iron over the local stretch above Radford even after the limited federal improvement, the testimony of local non-expert witnesses who had actual knowledge with respect to alleged uses of the river—all plainly established that the river in its natural and ordinary condition is not navigable in interstate commerce at any point in its course. Officers of the Corps of Engineers, including two Chiefs of Engineers, have repeatedly reported, after careful examination, that New River is not navigable at any point in its course; and all the considered action of Congress and the War Department supports the finding that New River is non-navigable.

The limited federal work in three widely separated local stretches (which were "the most easily improved places") did not change the non-navigable character of New River in interstate commerce. (*Ex. 572*, text same as of Ex. 97, R. 2531.) All reliable testimony of temporary use related to intrastate use of the most favorable parts of these short stretches and was referable to the artificial improvement in those local stretches. It is highly doubtful (though not material in this case) whether intrastate navigability was created by these artificial improvements *in any part* of those stretches. However, it is sufficient that, as the lower courts found, these local improvements did not alter the natural non-navigable character of New River in interstate commerce. Whether intrastate navigability was artificially created in these stretches and, if so, at what point such navigability ended, was not in issue in the courts below and is not an issue here.

The evidence shows that the average slope of the river between Round Bottom, West Virginia, and Glen Lyn, Virginia, and indeed for 40 miles above Round Bottom, West

Virginia, is approximately 50 per cent greater than the average slope between Hinton, West Virginia, and Round Bottom, West Virginia, and that the other natural obstacles to any practical use in the first two mentioned stretches are also much more numerous and severe. Indeed, the testimony shows that the physical characteristics of the river in the 60-mile section between Radford, Virginia, and Round Bottom, West Virginia, are unique, found in no other stream of appreciable size and such as to negative navigability. The Army Engineers had several times specifically considered the Glen Lyn stretch and officially reported it to be non-navigable. Their reports show that neither before, nor during, nor after this limited federal work was New River, or any part thereof, used or susceptible of use in interstate commerce.

The fact that off and on from December 1881 to some time in 1882 or 1883, a small quantity of charcoal-iron was experimentally boated a short distance downstream to Radford and that some of this iron, after wagoning to the railroad, was shipped by rail, possibly in interstate commerce, does not make this intrastate stretch a navigable water of the United States. While the failure of this experiment negatived navigability of this intrastate stretch even after the attempted artificial federal improvement, the legal proposition advanced by petitioner is plainly unsound under the settled decisions of this Court. *The Daniel Ball, supra,* 563; *The Montello,* 11 Wall. 411, 415; *United States* v. *Utah,* 283 U. S. 64, 75. This is quite apart from the fact that such alleged commerce does not now exist, has not existed for over 50 years and, so far as can be foreseen, never will exist in the future.

Petitioner does not attempt to show that the finding of non-navigability is not supported by substantial evidence. Petitioner in effect merely asserts that there was some conflicting evidence. Manifestly, this presents no question for review.

## II.

Whether or not respondent's intended acts would substantially impair the navigable capacity of any navigable water of the United States was plainly a question of fact as to which the burden of proof rested upon petitioner. *United States* v. *Rio Grande D. & I. Co.*, 174 U. S. 690, 710; *Edison Co.* v. *Labor Board*, 305 U. S. 197, 223. The finding, concurred in by the lower courts, that respondent's project will not impair the navigable capacity of any navigable waters of the United States, is supported by substantial evidence and not assailable here.

The evidence plainly establishes that respondent's project will not diminish the flow from above the damsite so as to impair the navigable capacity of the Kanawha or Ohio Rivers during allegedly "critical low water periods". Due to evidence introduced by petitioner upon assumptions wholly unrelated to any intended acts of respondent, other evidence was received which established that even a complete shut-off of all contribution from above the damsite during a low water season (an assumption wholly unrelated to any intended act of respondent) would not impair the navigable capacity of the Kanawha or Ohio Rivers. However, during the low water season of every year, respondent's project will increase the average low water flow below the damsite and in extremely dry years will increase such flow from a minimum of 600 s. f. to an average of 1230 s. f. (R. 1521-2). Assuming a week-end (Sunday) shutdown of 34 hours (the maximum contingently possible in respondent's operations) and a week of extreme low flow (when, if ever, the matter of contribution from above the damsite would be material), the contribution from above the damsite to the flow at the mouth of the Kanawha, with respondent's project in operation, can never fall below approximately 850 s. f. in comparison with a natural flow of 600 s. f. and generally will be substantially greater. Under similar conditions, the contribution from above the

damsite to the flow at Kanawha Falls (above the head of navigation) would never fall below 770 s. f. in comparison with a natural contribution of 600 s. f.

Petitioner's assertion that there is difficulty in maintaining depths in the Kanawha and Ohio Rivers during allegedly "critical low water periods" and that the New River on one occasion in August 1918 contributed 38 per cent. of the flow of the Ohio below the mouth of the Kanawha, and on another occasion in September 1930 contributed 70 per cent. of the flow of the Kanawha at its mouth, are based upon the estimates of flow which are not only contradicted in, but shown to be, grossly erroneous by the record. However, for the reasons above stated and others too detailed to enumerate, the assertion would be immaterial were it true.

The assertion that respondent's project will produce tides or "so-called waves" in the Kanawha River of such size and character as to interfere with navigation is completely refuted by the record. Respondent's project is separated from the head of navigation on the Kanawha River, the nearest navigable water of the United States, by 160 miles of tortuous river, broken by numerous shoals, falls, ledges, pools and rapids. The practical and intended operations of respondent's project are of the same character and order of magnitude as the actual operations of the power plants at the Government navigation dams on the Kanawha River, which manifestly do not impair navigable capacity, although they discharge directly into navigable waters. The size and rate of any variations in flow which will exist in the Kanawha will be determined by the operations of the Government licensed projects on the Kanawha and not by respondent's project.

Tests involving discharges far larger than the maximum hydraulic capacity of respondent's project, had been made by respondent in cooperation with the Geological Survey and the Army Engineers; and the uncontradicted evidence showed that these tests produced no interference with

navigation or navigation works in the Kanawha. The conclusion was confirmed by actual tests made at the power plants in the navigation dams on the Kanawha River.

The description of these variations in flow as "waves" is of course misleading. By the time the "waves" in the great tests, first above referred to, reached the head of navigation, their front had an average slope of 5 inches in about 20 miles, or ¼ of an inch per mile, and their back had an average slope of about 5 inches in 80 miles, or 1/16th of an inch per mile.

The finding, concurred in by the lower courts, is also supported by the testimony of numerous witnesses of the highest standing and ability and the widest experience.

## III.

Since respondent's project is not located in navigable waters and will not impair the navigable capacity of any navigable waters, it is plain that petitioner has failed to establish any violation of the Rivers & Harbors Act of March 3, 1899. *United States* v. *Rio Grande D. & I. Co., supra.*

## IV.

Upon the facts of this case as found by both lower courts on substantial evidence, the Power Act is so plainly inapplicable that no question of its construction or interpretation is presented; and petitioner so conceded in its petition for certiorari (16-17) and in the court below (Pet. Supp. Br. below 236-7).

Petitioner's argument that Section 23 authorizes and requires a license for respondent's project because its incidental effect upon navigation, if any, is beneficial, is untenable in fact and law. While it is true that the incidental effect of respondent's project, if any, upon navigable capacity, or flood control as related to navigation, is beneficial, the evidence plainly shows that any beneficial

effect is indirect and incidental. While we deny that petitioner has constitutional authority to regulate intrastate matters because of a supposed or real beneficial effect upon interstate commerce, an essential factual basis for the exercise of such claimed authority, if it existed, would be that the beneficial effect should be direct and substantial. But the contention is also erroneous as a matter of law.

We think it clear that the Power Act does not apply to non-navigable streams, that it merely authorizes the Commission to license projects on navigable streams, and that a finding under Section 23 "that the interests of interstate * * * commerce would be affected" is merely a formula for finding whether the project is in navigable waters. However, if Section 23 may be construed as applying at all to a project on a non-navigable stream, then it is clear that 'effect upon commerce' must be construed as meaning only an adverse effect.

The Federal Water Power Act, which did not prohibit anything, was enacted to provide a means more convenient than a special act of Congress for giving assent in certain of the cases where required under the Rivers & Harbors Act of March 3, 1899; and such assent was required, if at all, for a project on a non-navigable stream only if it impaired navigable capacity. *United States* v. *Rio Grande D. & I. Co., supra.* Since the Power Act is not only in *pari materia* but purely complementary to the Rivers & Harbors Act, it must be similarly construed. Moreover, both the Congress and this Court, in deference to constitutional limitations upon the Federal Government, have consistently used and construed the phrase "effect upon interstate commerce", when invoked as a basis for federal regulation of intrastate matters, as meaning an adverse effect. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 31-2, 36-7; *Stafford* v. *Wallace,* 258 U. S. 495, 528. If the phrase could be regarded as ambiguous, as it can not, the fact that petitioner's construction would obviously render the statute unconstitutional would preclude its adoption. *Interstate*

*Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14. As petitioner concedes, none of the amendments of 1935 touch or affect the construction of this phrase.

While, in our opinion, the Court does not reach the question in this case, the Power Act, properly construed in the light of its language, legislative history and contemporaneous interpretation and in the light of the Rivers & Harbors Act to which it is complementary and which is still applicable, does not apply to any project on a non-navigable stream.

Assuming *arguendo* the Power Act could be construed as applying to a project on a non-navigable stream under some conditions, it can only be construed as authorizing or requiring a minor-part license for such a project under Section 10(i) of the Act, with license conditions limited to those having a real and substantial relation to the protection of navigation or navigable capacity. It is undisputed that respondent, while denying any authority of petitioner to require any license for its project, has repeatedly offered to accept such a minor-part license and that petitioner steadfastly refused to issue any license unless respondent would accept numerous burdensome conditions in excess of petitioner's constitutional authority. Consequently, petitioner would be barred from relief even if the Act could be so interpreted.

## V.

If the Power Act were construed as applicable to respondent's project, it would be to that extent unconstitutional and void. Petitioner has no constitutional authority to require any license for respondent's project, which is located on non-navigable waters and will not impair navigable capacity. The precise constitutional authority invoked by Congress was its implied authority in relation to navigable waters. The United States has no title or property right in the waters, the beds or the water powers of

either navigable or non-navigable streams. Its authority is limited to control of navigable waters solely for purposes of navigation.

The right of a riparian owner on a non-navigable stream, to develop water power or otherwise use his property, is subject to no servitude in favor of navigation and may not be taken or restricted without compensation. Of course no one has a right to create or maintain a nuisance. However, that limitation upon the use of property is not a servitude but merely results from the delimiting aspects of any definition of property rights. Any constitutional authority of the United States is no different or greater in relation to non-navigable waters than in relation to land and, consequently, it has no constitutional authority to make illegal *per se* the erection or maintenance of structures without a federal license merely because they are located in non-navigable waters. Since respondent's project is located in non-navigable waters and will not impair navigable capacity, petitioner plainly has no constitutional authority to require a license for its construction. Nor does petitioner have constitutional authority to require a license for respondent's project under any other aspect of the commerce clause. The construction of a hydroelectric plant and its operation for the generation of electricity is not interstate commerce. *Utah P. & L. Co.* v. *Pfost*, 286 U. S. 165, 179-82.

## VI.

But, even if petitioner had authority to require some license for respondent's project, it could not constitutionally impose those conditions of the tendered license unrelated to the protection of navigation. An examination of the license conditions shows that they seek to impose numerous burdensome regulations upon respondent which have no real and substantial relation to the prevention of any substantial impairment of the navigable capacity of navigable waters, which seek to impose upon respondent regulations involving

an exercise of local powers of government, such as the police power, in violation of the Ninth and Tenth Amendments, and which would require respondent, on the one hand, to devote its property to a public use without compensation and, on the other, to surrender its property to petitioner for an unconstitutional purpose. Nor are they sustainable under any other aspect of the commerce clause. Neither the construction of respondent's project nor the generation of electricity is interstate commerce. *Utah P. & L. Co.* v. *Pfost, supra.* But, even if they were, petitioner could not impose such license conditions, including the surrender of a citizen's manufacturing plant to petitioner for an unconstitutional purpose, and on confiscatory terms, as a regulation of interstate commerce.

Petitioner's argument that respondent can not now raise the question of the validity of the capture clause (Section 14) is plainly unsound. Upon acceptance, a license by the very terms of the statute becomes a contract which can thereafter be altered only by "mutual agreement." (Sec. 6; *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, 378-9; *Alabama P. Co.* v. *Gulf P. Co.*, 283 Fed. 606, 615.) It is well established that one may not obtain relief from his contract upon the ground that he has made a bad bargain and that consequently the contract is confiscatory. *Columbus R. & P. Co.* v. *Columbus*, 249 U. S. 399. This is quite apart from the fact that one who founds a right upon a statute (as would be the case if a license were accepted) may not challenge its constitutionality in other respects. *Hurley* v. *Commissioners*, 257 U. S. 223.

The case of *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651 (cited Pet. Br. 141), is plainly inapposite as pointed out by the court below (R. 2921). Quite aside from the striking differences between the capture clause of the Power Act and the terms of the Wisconsin statute (Pet. Br. 141), a State not only has the right to engage in the electric power business if it chooses, but so long as it does not confiscate acquired rights, it may establish such law of property, riparian and other, as it chooses.

# ARGUMENT.

## POINT I.

**The Courts below did not err in finding and concluding that New River is not navigable in fact in interstate commerce, and consequently is not a navigable water of the United States, either at respondent's damsite or at any other point in its course.**

Navigability, in the federal sense, is a question of fact (*Crowell* v. *Benson*, 285 U. S. 22, 55; *Arizona* v. *California*, 283 U. S. 423, 452), and "each determination as to navigability must stand on its own *facts*[1]". *United States* v. *Utah*, 283 U. S. 64, 87. Findings of fact which are concurred in by two lower courts, will be accepted as unassailable by this Court if supported by substantial evidence. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477.[2] That this rule applies to a finding that a stream is not navigable in fact in interstate commerce is not open to debate. *In Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, the finding of fact which this Court declined to review because concurred in by two lower courts was that the stream "was not, and never had been, navigable within the adjudged meaning of that term" (*loc. cit.* 86).[3]

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[1] All italics are supplied unless otherwise specifically indicated.

[2] The distinction which petitioner urges (Pet. Br. 30) between findings of basic or evidentiary facts and findings of ultimate facts is non-existent. Findings of ultimate facts concurred in by two lower courts and supported by substantial evidence are not assailable in this Court. *United States* v. *O'Donnell*, 303 U. S. 501; *Texas and N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548; *Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3, 4; *United States* v. *Commercial Credit Co.*, 286 U. S. 63; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Baker* v. *Schofield*, 243 U. S. 114.

[3] Nothing more clearly illuminates the fatal weakness of petitioner's attempt to escape the effect of this rule than its citation of authorities. (Pet. Br. 30.) *The Montello*, 20 Wall. 430, was

(*Footnote continued on next page*)

The petitioner cannot escape the consequences of this rule by the disingenuous argument that the petitioner merely "differs" with the lower courts on the "legal question" of the "weight and relevance" of the evidence (Pet. Br. 29). No question on the admission or rejection of evidence (as a matter of relevancy or otherwise) is presented to this Court by petitioner; and manifestly the litigant's disagreement with the "weight" accorded various selected items of evidence by the courts below presents no issue of law for this Court.

Consequently the only questions presented in this aspect of the case are:

*First*: Did the courts below adopt the correct definition of navigable waters of the United States?

*Second*: Is the concurrent finding of the two lower courts supported by substantial evidence?

The answer to both questions is plainly in the affirmative.

**A. The courts below adopted the correct definition of navigable waters of the United States.**

To support this proposition, it is only necessary to refer to the definition of navigable waters respectively adopted and applied in the opinion of the District Court (R. 122-125) and in the opinion of the Court of Appeals (R. 2892). A mere reading of the opinions establishes that both courts adopted

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decided in 1874, approximately twenty years before the creation of intermediate courts of appeal (Act of March 3, 1891, 26 Stat. 826), and even on a direct review of the trial court, merely held that this court would review *not the weight of the evidence but the correctness of the legal definition of navigable waters adopted by the trial court.* In *Leovy* v. *United States,* 177 U. S. 621, 628, this court merely held that the correctness of instructions to a jury was open to review. *Arizona* v. *California,* 283 U. S. 423, was an *original* suit in this court! On the other hand, in the *Brewer-Elliott* case, this court held, in accordance with the settled principle, that this rule applied to a concurrent finding of non-navigability just as to any other finding of fact.

and applied the classic definition of navigable waters which was laid down by this Court in *The Daniel Ball*, 10 Wall. 557 (and consistently adhered to since that time), together with such clarifying interpretations of that definition as have been subsequently enunciated by this Court. Indeed, petitioner stated in the Court of Appeals that "there is little or no disagreement with the court below (District Court) as to the meaning of 'navigable waters of the United States'" (Pet. Sup. Br. in Court of Appeals 31), and the Court of Appeals applied the same definition.

The petitioner, in its discussion of the definition of navigable waters of the United States (Pet. Br. 30-35), does not attempt to point out any error in the definition of navigable waters adopted by either court below.[1] Instead it embarks on an argument that the definition of navigable waters in Section 3(8) of the Federal Power Act is "in truth simply a • • • codification of the criteria" of navigable waters which have been enunciated by this Court (Pet. Br. 34-5). From that standpoint, the discussion is an idle and space-consuming one. If petitioner's conclusion is sound, we must still look to the decisions of this Court to determine what those criteria mean. And, the petitioner, asserting that this statutory definition is a mere codification of the criteria enunciated by this Court, could hardly assert that the lower courts erred in adopting the definition of navigability promulgated by this Court.

On the other hand, if it be contended that the definition in the Power Act is broad enough to include waters not navigable in fact in interstate commerce, that statutory definition is to that extent manifestly void. Where a question of federal authority arises, navigability is a constitutional fact. Navigability in law depends upon navigability in fact; and

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[1] Petitioner's discussion entitled "The legal criteria of the courts below" (Pet. Br. 55-59), while involving many inaccuracies, merely relates to comments of the lower courts upon the character and weight of certain items of evidence and not to the definition of navigability adopted by them. This discussion of petitioner is therefore examined at pages 45 *et seq.*, *infra*.

such a contention would come down to a proposition that facts, even facts upon which depends the existence of jurisdiction or constitutional authority, may be created by legislative fiat. That such is not the case is too plain to require discussion. *United States* v. *Cress*, 243 U. S. 316, 322; *Crowell* v. *Benson*, 285 U. S. 22, 55.

Therefore, contrary to petitioner's assertion, Congress may not "fix the precise boundaries of its commerce clause jurisdiction" or "define the character of streams which require federal control" (Pet. Br. 34) by declaring streams not navigable in fact in interstate commerce to be navigable waters of the United States. Constitutional power is not a matter of legislative definition. Unless the statutory definition of navigable waters is narrower than the judicial and constitutional definition, it follows that in so far as the authority sought to be exercised by petitioner depends upon establishing that New River is a navigable water of the United States, it is immaterial what definition may be included in the Federal Power Act.

However, we think that the petitioner has misconstrued the definition of navigable waters in the Power Act. With immaterial parts omitted, and the different parts and clauses designated by letter or number for convenience of discussion, that definition reads:

> "'navigable waters' means
>
> (Part A) those *parts* of streams • • • (Clause 1) over which Congress has jurisdiction under its authority to regulate commerce • • • among the several States, *and* (Clause 2) which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, *are* used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids,
>
> (Part B) together with such *other parts* of streams as shall have been authorized by Congress for improvement by the United States or shall have

been recommended to Congress for such improvement after investigation under its authority;" (Sec. 3(8)).

Since Part B of the definition obviously has no application,[1] it is unnecessary to consider its proper interpretation; and we confine our discussion to Part A.

Long prior to the adoption of the Federal Water Power Act, the phrase in Clause 1 reading—"over which Congress has jurisdiction under its authority to regulate commerce • • • among the several States," had been authoritatively construed to mean those parts of streams which are navigable in fact in interstate commerce. *United States* v. *Rio Grande D. & I. Co.*, 174 U. S. 690. The definition so far, therefore, merely declares that navigable waters are those which are navigable in fact in interstate commerce. But, Clause 2 of the definition is in the conjunctive—not an *exception* but *an addition* to what has gone before—and sets up an additional requirement for navigable waters for the purposes of the Act. This plainly means that, to satisfy the statutory definition, a part of a stream must be used or suitable for use *at the present time and under present conditions* by the customary mode of trade and travel by water which prevails as of the date when the question of applicability of the Act arises. Thus a *past* use or suitability for use is not enough under the Act.

The reference to interrupting falls, shallows, or rapids merely takes cognizance of the rule that *occasional* interruptions in a stream *generally navigable* do not destroy its navigability. It will thus be seen that the statutory definition is narrower than the judicial and constitutional definition; consequently petitioner cannot complain because the lower courts adopted and applied a broader definition of navigable waters than that prescribed by the statute upon which petitioner relies.

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[1] New River was not authorized or recommended for improvement at the date of the Act and has not been authorized or recommended for improvement at any time since.

Petitioner contributes nothing but confusion by injecting into its discussion of the *definition of navigable waters*, an argument that, in order to make effective its regulation and protection of interstate commerce, Congress may sometimes, under some circumstances and to some extent, impose regulations of a limited character upon matters which are not a part of interstate commerce or of instrumentalities of interstate commerce (Pet. Br. 34). This is quite beside the point as to what constitutes navigable waters of the United States. At an appropriate place in this brief, we shall discuss this quite unrelated question. (See pp. 61-3, *infra.*)

**B. The relation of the constitutional character of federal navigable waters to a proper determination of an issue as to federal navigability.**

Navigability in the federal sense is a question of constitutional fact. *Crowell* v. *Benson*, 285 U. S. 22, 55; *Arizona* v. *California*, 283 U. S. 423, 452. Neither Congressional appropriations for improvements nor other federal legislation or acts of federal officers or agencies can establish navigability of a river in interstate commerce, but the question is always one of fact to be determined by the courts. *Oklahoma* v. *Texas*, 258 U. S. 574, 585, 590-1. Indeed, the abandonment of such a federal attempt to create an interstate navigable waterway upon any stream tends to create a presumption against navigability. *Oklahoma* v. *Texas*, *supra*, 590.

Navigable waters of the United States are waters which are *navigable in fact* and which, by themselves or by uniting with other waters (navigable in fact) form a continuous highway over which commerce is or may be conducted among the States or with foreign countries in the customary modes in which commerce is conducted by water. *The Daniel Ball*, (1870) 10 Wall. 557; *The Montello*, 11 Wall. 411, 415; *United States* v. *Oregon*, 295 U. S. 1, 23. Navigability in fact must exist under "natural and ordinary con-

ditions." *United States* v. *Oregon, supra,* 23; *United States* v. *Cress,* 243 U. S. 316, 321, 325-6; *United States* v. *Holt State Bank,* 270 U. S. 49, 56. Exceptional use, or susceptibility of use, in times of temporary high water or under other abnormal conditions, is insufficient. *Oklahoma* v. *Texas, supra,* 587; *United States* v. *Rio Grande D. & I. Co.,* 174 U. S. 690, 699. To be navigable in fact, a water must have a "capacity for *general and common usefulness* for purposes of trade and commerce." *United States* v. *Oregon, supra,* 23. *The Montello,* 20 Wall. 430, 442-3; *Donnelly* v. *United States,* 228 U. S. 243, 262.

It must be used or susceptible of use for "commerce of a *substantial and permanent character.*" *Leovy* v. *United States,* 177 U. S. 621, 632;[1] *United States* v. *Doughton,* (C. C. A. 4th) 62 F. (2d) 936, 938. "A theoretical or potential navigability or one that is temporary, precarious and unprofitable, is not sufficient." *Harrison* v. *Fite,* (C. C. A. 8th) 148 Fed. 781, 784; *United States* v. *Doughton, supra,* 939. Where "*a stream has never been impressed* with the character of navigability *by past* use in commerce, • • • commerce actually *in esse* or at least • • • *in posse* is essential to navigability," *Gulf & I. Ry. Co.* v. *Davis,* 26 F. (2d) 930, 933, aff. 31 F. (2d) 109, cited with approval in *United States* v. *Doughton, supra.* Whether practical capacity for carrying useful, substantial and permanent commerce exists is a question of fact. *United States* v. *Utah,* 283 U. S. 64, 87; *Crowell* v. *Benson,* 285 U. S. 22, 55.

In short, the question is a practical one. Mere "physical possibility of passing by a boat" from one State to another is not sufficient to establish navigability. *Leovy* v. *United States,* supra, 635. The question is whether the stream in its natural and ordinary condition has a *real* and *substantial* capacity for *genuine, practical, common* and *general usefulness* for purposes of trade and commerce.

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[1] The holding of this case on the amount of commerce necessary to establish navigability has been cited with approval in *Oklahoma* v. *Texas,* supra, 591, and *United States* v. *Oregon, supra,* 23.

There are fundamental and compelling reasons for the rule that a mere technical, theoretical, insubstantial or impractical capacity for interstate navigation is not sufficient and that, to establish navigability in fact, there must be shown a real, practical and genuinely useful capacity for carrying interstate commerce of a substantial and permanent character. In such cases the court is dealing with the question whether there exists a factual basis for the exercise of federal authority and hence, in the matter of finding the facts, the court is drawing the line between federal authority and the powers and rights reserved to the States and the people. The authority of the federal government is not to be extended and the reserved rights of the States and the people curtailed on the basis of negligible or inconsequential things. *Leovy* v. *United States, supra,* 623; *United States* v. *Doughton, supra,* 938. Cf. *Schechter* v. *United States,* 295 U. S. 495; dissenting opinion Cardozo J. in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 327-8; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *Steward Machine Co.* v. *Davis,* 301 U. S. 548.

**C. The concurrent finding of both lower courts that New River is not navigable in fact in interstate commerce at any point in its course, is supported by evidence not only substantial but conclusive.**

Petitioner alleged in its Bill that New River is navigable from Wilson Creek to its mouth (Bill, Pars. 4, 9, R. 5, 7-8), requested the District Court so to find (Req. Fdg. 34, R. 93) and assigned error to the refusal of the District Court so to find (Ass. of Errors No. 3, R. 158). However, in this Court, as in the Court of Appeals, petitioner has abandoned the allegations of its Bill and its requested findings and has limited its claim of navigability to the reach between Allisonia, Virginia, and Hinton, West Virginia (Pet. Br. 35; R. 2900).

As the lower court held (R. 2900), the burden of proving navigability of New River rested upon the petitioner,

the party asserting "the existence of the public servitude". *Harrison* v. *Fite*, (C. C. A. 8th) 148 Fed. 781, 785; *Mintzer* v. *Dredging Co.*, 242 Fed. 553, 559, affirmed 245 Fed. 297.

Both courts below found that New River is not navigable in fact in interstate commerce either *at the site of respondent's project or at any other point in its course.* See pp. 15-16, *supra.* The question here is whether this concurred in finding is supported by substantial evidence. This is, we think, conclusively established by the evidence reviewed in the opinions of both lower courts (R. 107-126; R. 2893-2904), although the evidence so reviewed by no means exhausts the evidence which supports the findings. Indeed, in the Court of Appeals, petitioner said:

> "It cannot be said that the New River presents a 'clear case' of navigability or non-navigability * * *." (Pet. Supp. Br. below, 268.)

While we think the evidence plainly shows a clear case of non-navigability, manifestly, in the face of this admission, petitioner cannot be heard to say that the concurred in finding is not supported by substantial evidence.

For the foregoing reasons, it would, we think, be unjustifiable to burden this Court with an extended analysis of the voluminous evidence upon this issue; and we shall, therefore, review the evidence only sufficiently to show that the concurred in finding of the lower courts is plainly supported by substantial evidence. However, if the Court should be interested in a more detailed analysis and discussion, it will be found in Part I of the separately bound Appendix A to this Brief.

1. *The physical characteristics of New River alone establish that New River in its natural and ordinary condition was not navigable in interstate commerce in the Allisonia-Hinton reach or elsewhere in its course.*

*Significance, interrelation and cumulative effect of various natural obstacles to navigability.* As petitioner

conceded in the court below, low stream flow, limited depths and widths of channel, high and irregular velocities, shoals, falls, rapids, tortuous channels, rocky beds and banks, steep slopes, large scattered boulders and concealed rock ledges are all evidence of non-navigability (Pet. Br. in Court of Appeals 33-35, 41). All of these types of impediments to navigability are found in New River. (R. 2893-5, 2901)

Whether such natural obstacles and obstructions foreclose useful navigable capacity can be determined only by examining not merely the frequency and severity of each type of obstruction but also the cumulative effect of all types of obstacles in the stream. Petitioner however, in so far as it considers physical characteristics at all (Pet. Br. 62-5), urges upon this Court a determination of useful navigable capacity by considering only whether each particular type of impediment to navigation would, *by itself and in the absence of any other obstacles or impediments*, be tolerable for practical navigation.

*Physical characteristics as disclosed by the evidence.* Some of this evidence is summarized in the opinion of the Court of Appeals (R. 2893-5; 2901). In contrast with an average slope of 1.25 feet per mile on the navigable Kanawha, the average slope of New River between Wilson Creek and its mouth is 7.1 feet per mile (R. 107; for comparison of profiles, see Plate I at end of this brief). The Reports of the Army Engineers, from the mile-by-mile survey (Ex. 31, R. 2282; Ex. 35, R. 2351) of New River from Hinton to the North Carolina line (made by Army Engineers in 1872 before any Federal work[1]) to the Report of General Taylor, Chief of Engineers, in 1925 (*Ex. 572*, text same as Ex. 97, R. 2528), definitely establish that shoals, rapids, falls and huge boulders were so numerous, general and continuous as to

[1] When the first survey was made, the discharge was 2,000 c. f. s. at Lead Mines (43 miles above Radford) and 3,000 at Lipford (Sifford's Falls, below Radford), so that the river was substantially at its average yearly flow and not even a low water condition. (Ex. 31; R. 2281-2.)

preclude navigability in fact (R. 2897). In general, the river consists of short pools, separated by shoals, falls, rapids, rocky ledges and masses of huge boulders, the latter also being found in many of the pools. Where any channel exists through the shoals, rapids and falls, it is frequently tortuous, narrow, and difficult to find (R. 107-8; 1676 et seq.; 1783-6, 1706-8, 1660-1, 943-5).

The photographs of *some* of the natural obstacles to navigability, which were introduced by respondent, plainly show a non-navigable stream (See (Photo) Appendix B to this brief). Respondent also suggests comparison between petitioner's aerial photographs (Pet. Br. 72, footnote) and respondent's photographs; but the comparison should be made between Petitioner's Appendix Vol. III (reasonably good photostats) and the corresponding photographs in Respondent's Appendix B (largely photoprints and reasonably good photostats)—not with respondent's photographs in Petitioner's Appendix Vol. V (very poor photostats). In fact, petitioner's aerial photographs are taken under such conditions as to minimize or obscure the natural obstacles and its ground photographs are often taken either from upstream or at such a distance as to minimize, and in some cases they wholly fail to show, important rapids or falls (See Appendix A. 24-29).

The testimony of the witness Matthews, a professor of geology who had specialized in stratigraphy and who had made a study of the stream for the Virginia Geological Survey, plainly shows that New River is *sui generis*, that the physical characteristics of the particular section of New River between Radford, Virginia, and Round Bottom, West Virginia, (the one which the petitioner now claims to be navigable) are unique, found in no other river of appreciable size and such as to preclude navigability in fact. (R. 2894, particularly footnote; R. 1675-87). See also the testimony of Major Putnam (R. 1785-6).

*The actual conditions disclosed by federal work.* The natural non-navigable character of New River was con-

firmed by the conditions encountered in the limited federal work undertaken in "the most easily improved places" on "three widely separated stretches with unnavigable reaches between them"[1]. (*Ex. 572;* text same as printed Ex. 97, R. 2531). In attempting to create a narrow channel, with low-water depth of only 18 inches (Ex. 37, R. 2373), it was found that ledges and shoals actually comprised from 34 to 44 per cent. of the entire distance covered by these short attempted improvements.[1] (Computed from Ex. 39; R. 2398; 2402-3 and *Ex. 563,* p. 2251. See also Appendix A 32-36). The reports of the Engineers disclose that even in these most favorable reaches the depth of water over the ledges and shoals (obviously at the deepest point and probably for an inconsequential width) was rarely over one foot (Ex. 37, R. 2370) and frequently only "a few inches" (Ex. 145, R. 2710) or again only "4-6 inches" (Ex. 35. R. 2340). Yet, when the channel was cut, the Engineers found that the previously excessive velocities were very greatly increased (Ex. 34, R. 2332). The conditions encountered were compelling evidence of non-navigability. *Oklahoma* v. *Texas, supra,* 590-1.

2. *The limited federal work did not change the natural non-navigable character of New River in interstate commerce.*

This "work was limited to the most easily improved places and effort made to so ameliorate conditions as to permit local navigation" over short stretches above Hinton and Radford, respectively, to the rail heads at those places (*Ex.*

[1] The so-called "measurements" of petitioner's witness Gerdes (Pet. Br. 69-71) were completely refuted by the official survey of the Corps of Engineers and their actual experience in trying to cut an insignificant channel in the parts of the river which were most easily susceptible of artificial improvement. His "measurements" were largely mere estimates, and he admitted that at various places he was afraid that he or his associates would be swept away in the current if actual measurements were attempted (R. 933-5, 930).

*572,* same text Ex. 97, R. 2531). We have already referred to the actual conditions encountered in these attempted improvements. The work did not change the natural non-navigable character of the stream in interstate commerce (R. 2897, 2903-4).

It is highly doubtful (though not material in this case) whether intrastate navigability was created even temporarily by these artificial improvements (undertaken between 1877 and 1886) in any part of those stretches (R. 2897, 2903-4). Thus an experimental attempt (initiated in December, 1881 and abandoned in 1882 or 1883) to boat charcoal-iron downstream to Radford from two of the sixteen furnaces tributary to the artificial improvement in that stretch, was unsuccessful (R. 2392, 2400, 1728-34, 1749-50, 1568-72, 1561, 294). However, whether intrastate navigability was artificially created in those stretches, and if so, at what point such navigability ended, was not in issue in the courts below and is not in issue here. Any temporary use which was brought about in the stretch above Hinton was at least below Round Bottom, West Virginia, and consequently, as the lower courts found, was not interstate (R. 115, 2902).

*Non-navigable character of Round Bottom-Radford section unchanged; important physical and other differences between that section and Hinton-Round Bottom stretch.* Petitioner's argument, based upon the erroneous assumption that navigability had been established throughout the stretches above Hinton and Radford and being to the effect that consequently the long intervening section must be navigable, is plainly untenable, quite aside from the erroneout hypothesis upon which it is based (Pet. Br. 35-6, 67-9).

Apart from the fact that any navigability above Hinton, outside of strictly local pools or during high water, was created by the artificial improvement, there are wide differences between the physical characteristics of that stretch and those of the stretch between Round Bottom and Glen Lyn, or those of the 60-mile middle section extending

from Round Bottom to Radford. The average slope of the river between Hinton, West Virginia, and Round Bottom, West Virginia, is, as stated by petitioner below (Pet. Br. below 52), 3.7 feet per mile. The average slope of the stretches from Round Bottom to Glen Lyn and indeed for the first 40 miles above Round Bottom, is approximately 5.5 feet per mile or *about 50 percent greater* (*Ex. 196,* R. 1242). The falls, rapids, shoals and other obstacles are also much more numerous and severe. See Appendix A 8, 25. We have already invited attention to the testimony of Prof. Matthews showing that the physical characteristics of this intervening section of New River are unique and such as to preclude navigability (See p. 40, *supra*). Indeed, the Corps of Engineers had specifically examined the Glen Lyn stretch and officially reported it to be non-navigable (Ex. 579B, R. 2862; Ex. 579C, R. 2863-4).

This official view, and its correctness, are strongly emphasized by the proposal of the petitioner to construct a few miles above Hinton the Bluestone Dam, which, were the stretch navigable, would be a complete barrier to navigation (R. 2899),[1] and by the fact that in the license tendered respondent the conditions incorporated for the alleged protection of navigation relate only to the navigable Kanawha (Ex. 131, Art. 15, R. 2670).

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[1] Petitioner, criticising the lower court for finding that the Bluestone Dam will have no locks or means for navigation (R. 2899), erroneously asserts that "a barge lift is to be provided" (Pet. Br. 86). While the cross-examination of petitioner's witness refutes this assertion (R. 1385-7), it is sufficient to point out that the verified bill of particulars filed by petitioner in the pending condemnation proceeding (Pet. Br. 110) states: "The proposed dam is to be a straight, concrete gravity structure with a spillway controlled by twenty-one gates, each 31 feet in height and 30 feet wide in the clear, *there being no facilities provided for water transportation.*"

3. *The absence of any use of New River by early traders, industries, or even military expeditions, is compelling evidence of its non-navigability.*

The evidence is uncontroverted that, until recent times, land travel down the New River valley presented tremendous difficulties and the greatest incentive to use New River or any practical water transportation no matter how difficult. The evidence established a complete absence of any use of New River from the settlement of the valley in 1774 (R. 1581-2) until in the 60's, when as a war measure involving physical possibility and not practicability, the Confederacy made an ineffective attempt to float some military supplies down New River to its commissary at Narrows, Virginia, and that the routes of trade and travel, and the routes used for marketing the products of lead smelters and charcoal-iron furnaces located on New River, were land routes which frequently paralleled and crossed New River and which, so far as they led westward or northwestward had their terminus at Kelly's Boat-Yard near Charleston, West Virginia, at the head of navigation on the Kanawha River (R. 1582-1604; 1725-36; 1752-3).

As evidence of "early navigation", petitioner states that "a number of expeditions navigated the river over the reach now in issue" (Pet. Br. 41). The "number" was in fact *two*—the John Marshall Expedition of 1812 (Ex. 189, R. 2716-35) and the Moore and Briggs Expedition of 1819 (Ex. 32, R. 2298-2324). The Marshall Commission "navigated" only, and the greater part of the "navigation" of the Moore and Briggs Expedition was over, the stretch from the mouth of the Greenbrier (a mile above Hinton) downstream to the mouth of the New River (R. 2725-6). Something of the character of this alleged "navigation" is shown by the facts that the Moore and Briggs "boat drew about nine inches (of) water" (R. 2307). These two exploratory expeditions are part of the history of the effort of the State of Virginia to locate a practical route *by land or canal* from the James River to the Kanawha and Ohio

Rivers (R. 2298-9; 2720-1, 2724) Obviously, neither expedition was in the usual course of trade, travel or commerce. Neither of these expeditions reported observing any use of New River but their reports do disclose the very grave and numerous natural obstacles to any practical use of New River other than by artificial improvement (R. 2723; see Appendix A pp. 39-53).

4. *Quite aside from the complete absence of early use, petitioner failed to establish practical use, or susceptibility for practical use, in interstate commerce.*

Petitioner in effect merely argues that certain general statements, considered apart from the definite statements touching the subject, in the Reports of the Army Engineers and certain selected items of testimony given by local non-expert witnesses, tend to support an inference of practical use or susceptibility for practical use, in interstate commerce in the Radford-Round Bottom section (Pet. Br. 42-55). In short, petitioner does not attempt to show that the concurred in findings of non-navigability are not supported by substantial evidence but, ignoring those findings and the great mass of evidence which squarely supports them, merely attempts to show that there was some conflicting evidence.

Petitioner completely misconstrues, or misuses, the engineering reports. The definite statements in those reports plainly establish that neither before nor during nor after the federal work was the river used, or susceptible of use, for interstate commerce (R. 2901). For illustration, the engineers reported: In 1873, that the improvement above Radford, "*if effected*" would open "to both eastern and western markets a large area of productive country, *now practically shut up*" (Ex. 31, R. 2288); in 1880, that a channel had been constructed 12½ miles above Hinton, West Virginia, "giving an outlet to the products of Mercer County, West Virginia" (Ex. 37, R. 2370); in 1881, that a channel had been completed 17¾ miles above Hinton to

McDaniel Falls, "giving an outlet to * * * Crumps Bottom and the Indian Creek country" and another, entirely separate and distinct, channel 12 miles above New River Bridge in Virginia "giving an outlet for timber and farm products, but not available for iron or ores until Radford furnace can be reached" (Ex. 37, R. 2370); in 1881, that the appriation for 1882 "will carry the improvement" past the "mouth of Lick Creek, 20 miles above Hinton, thus opening up the trade from" certain tributary territory (Ex. 37, R. 2370-1); in 1883, that charcoal-iron, zinc, copper and valuable timber above Radford "are kept from market by the non-completion of this work" (Ex. 39, R. 2400-1); in 1883, that the improvement, "when it reaches 35 miles above Hinton (which it never did), will give outlet to Peterstown, Monroe County, West Virginia" (Ex. 39, R. 2399); and in 1882 and 1883 (the last years that any work was done on the Hinton and Radford stretches and five and six years respectively after the improvements had been inaugurated) and in 1886 (four years after the last work on the Hinton and Radford stretches and nine years after the improvements had been inaugurated), that "the navigation of the river not being continuous as yet, it is practically a feeder to the several railroads which cross it and run along portions of it" (Ex. 38, R. 2384; Ex. 39, R. 2396; Ex. 41, R. 2407).

It is thus plain that *even these "most easily improved places"* (*Ex. 572* text same as Ex. 97, R. 2531) *were not navigable in their natural condition;* that any precarious navigability which they may have temporarily attained was dependent upon, and confined within the limits of, the small artificial channel created by the federal work; and that such use of New River, if any, as existed before the initiation of the federal work in 1877 was not only negligible in character but also purely local in a few favorable pools, or occurred during fortuitous high water (R. 2901).

These definite statements of the engineers cannot be overcome by reference to such occasional general state-

ments as that there were so many keel boats *somewhere* "in this part of the river", or that, some years after the work had been in progress, the work was beneficial to, or was planned to benefit, keel boats "now in use" *somewhere* on the stretches of the river in certain parts of which an artificial channel had already been created. (Pet. Br. 43-4.) No claim that the concurred in finding of the lower courts is not supported by substantial evidence can justifiably be based upon any such use of these reports.

The local non-expert testimony upon which petitioner relies is of the type which this Court has said is often vague and untrustworthy and must yield to evidence of a more definite character. (*United States* v. *Oregon*, 295 U. S. 1, 19; *Oklahoma* v. *Texas*, 258 U. S. 574, 586-7; XI 25.) This evidence, much of it hearsay, was not only contradicted by other testimony of like character, but also by other types of evidence of a higher order and by known facts. In discussing this testimony the Court of Appeals said in part (R. 2902):

> "It is said that this conclusion did not correctly appraise the effect of the oral nonexpert testimony; and in plaintiff's reply brief there are listed the names of 23 such witnesses from whose testimony it is contended the contrary conclusion should have been reached. We have carefully considered this testimony, but are not convinced that it was given too little weight. *This is the type of testimony that the trial judge who sees and hears the witnesses is particularly well qualified to appraise.* These witnesses were for the most part elderly men who were testifying purely from unaided memory of events long past. Such testimony has inherent infirmities and is obviously not entitled to the weight to be properly given to contemporary official written records (United States *v.* Oregon, 295 U. S. 19). *It also had to be appraised in connection with similar testimony of almost an equal number of witnesses introduced by the defendant by which it was to a considerable extent contradicted or qualified;*

*and proper consideration also had to be given to the other testimony in the case, verbal and documentary, of expert and scientific witnesses tending very strongly to show that the river was non-navigable in fact.''*

Petitioner seeks to avoid the effect of the weighing and sifting of this testimony by the courts below in connection with the mass of other evidence in the case by asserting that the lower courts introduced "novel qualifications to the definition of navigable waters" (Pet. Br. 55-8). The petitioner wholly misconceives the opinions below. The quotations by petitioner (Pet. Br. 56) from the opinions of both courts below clearly indicate, and the opinions as a whole conclusively show, that neither court was at that point enunciating standards of navigability but was only weighing and sifting particular evidence. Contrary to petitioner's unwarrantable assertion, the courts below did not say that "actual navigation" should be disregarded for any reason. What they did say was that certain evidence urged by the petitioner as proof of navigability in the Radford-Round Bottom section did not, when properly weighed and sifted, establish navigability even when considered by itself and that it had to be weighed in connection with other evidence both of a like character and of a higher order.[1] Thus the Court of Appeals reviewed the various lines of evidence pertaining to navigability (R. 2892-2904) and weighing all the evidence independently found that petitioner had failed to show that the river is a

[1] Contrary to petitioner's assertions (Br. 53-56), there is abundant evidence to support the finding regarding the relation of trips to high water. (McWane, R. 1661, see also Append. A, p. 120; Coleman, R. 200; Weiss, R. 232; Medley, R. 380; Farmer, R. 430; Knode, R. 1567; Harvey, R. 1637-8; Breeding, R. 259; Duncan, R. 274; Haley, R. 280; Snidow, R. 297; Allison, R. 310; Smith, R. 400; Peterson, R. 448, 449; Moore, R. 451; Martin, R. 453; Roop, R. 513.) This was also patent from the definite evidence of physical characteristics of New River in its natural and ordinary condition.

navigable water of the United States (R. 2900) under the definition of navigable waters enunciated by this Court. R. 2892; pp. 31-32, *supra*).

Petitioner has sought to give this testimony an appearance of dignity, reliability, precision and substance, first, by setting up in tabular form, like a multiplication table (Pet. Br. 178), a liberal, not to say loose, construction of the most extreme statement of each witness, largely given in response to leading questions, in complete disregard of modifications appearing either in the direct or cross examination and of demonstrated error; and second, by then (upon the basis of a further loose construction of the already distorted interpretation in the table) reducing to the precision and definiteness of a geometrical figure (Pet. Br. op. p. 48), all the hearsay of childhood, demonstrably erroneous statements and the most extreme statements, waveringly and uncertainly hazarded by any witness out of a hazy memory. And, in doing so, petitioner completely disregards all conflicting evidence both of the same type and of a higher character.

In this complicated process of cumulative distortion petitioner in its diagram, showing allegedly "commercial navigation", has mislocated the West Virginia—Virginia state line[1] (Ex. 518; R. 2909, 2938); located Sulphur Springs Branch three miles further upstream from Hinton than it actually is; treated the testimony of different witnesses with relation to the same alleged trip as evidence of separate uses of the river (6D,[2] R. 393-4; 33D, R. 198-200; 47J,

[1] Were the question material in this case (as it is not), the State line between Virginia and West Virginia on the New River is located, not at the upper end of Round Bottom but, at Wiley's Falls (Ex. 518, R. 2754A; Ex. 46, R. 2426A; R. 2909, 2938).

[2] This reference and similar references hereafter appearing in this brief are to the lines, indicating movement by water, of petitioner's chart of 'commercial navigation', or to respondent's revised chart entitled "Alleged Commercial Navigation", etc., as the text may indicate, each of which lines of the former, petitioner has designated by numeral and letter, e. g., 6D, 33D, 47J. Respondent has used the same designations on its revision (of petitioner's chart) inserted opposite page 50 hereof.

R. 373-4; 56E, R. 348-9); treated as common and ordinary use by the customary modes of trade and travel by water the unusual and hazardous moving of the McWane boat from Radford to Hinton on a five or six foot "tide", even though this craft was being brought down in the *unfulfilled* hope that it could be used advantageously above Hinton, after the utter impracticability of its use above Radford had been demonstrated, and was consequently sold at Hinton and shipped away on a railway car (33D, R. 1660-5); diagrammed, as 'uncontradicted' evidence of use in the customary modes of trade and travel by water, hearsay statements of alleged boating for railroad construction (2B, R. 483, 481-6; 12B, R. 416-7), although it had been shown by conclusive evidence that such statements were erroneous (R. 1647-56); diagrammed, as evidence of use of the river from Hinton to Glen Lyn, the statement of a witness who said that a man "came there with his auto" *in 1883* (*sic*) to have some material shipped up the river by boat (R. 484-5); treated the testimony of witness Dickinson as evidence of tobacco shipments from Glen Lyn to Hinton (6A) even though the witness's own testimony (that part not printed by petitioner below) showed that this witness had wagoned the tobacco downstream to a point two or three miles below Round Bottom, West Virginia, (about 10 miles below Glen Lyn) for shipment by water to Hinton (R. 394-5).

The foregoing by no means exhausts the inaccuracies and misstatements contained in petitioner's tabulation and diagram, but is merely illustrative of their untrustworthiness.[1]

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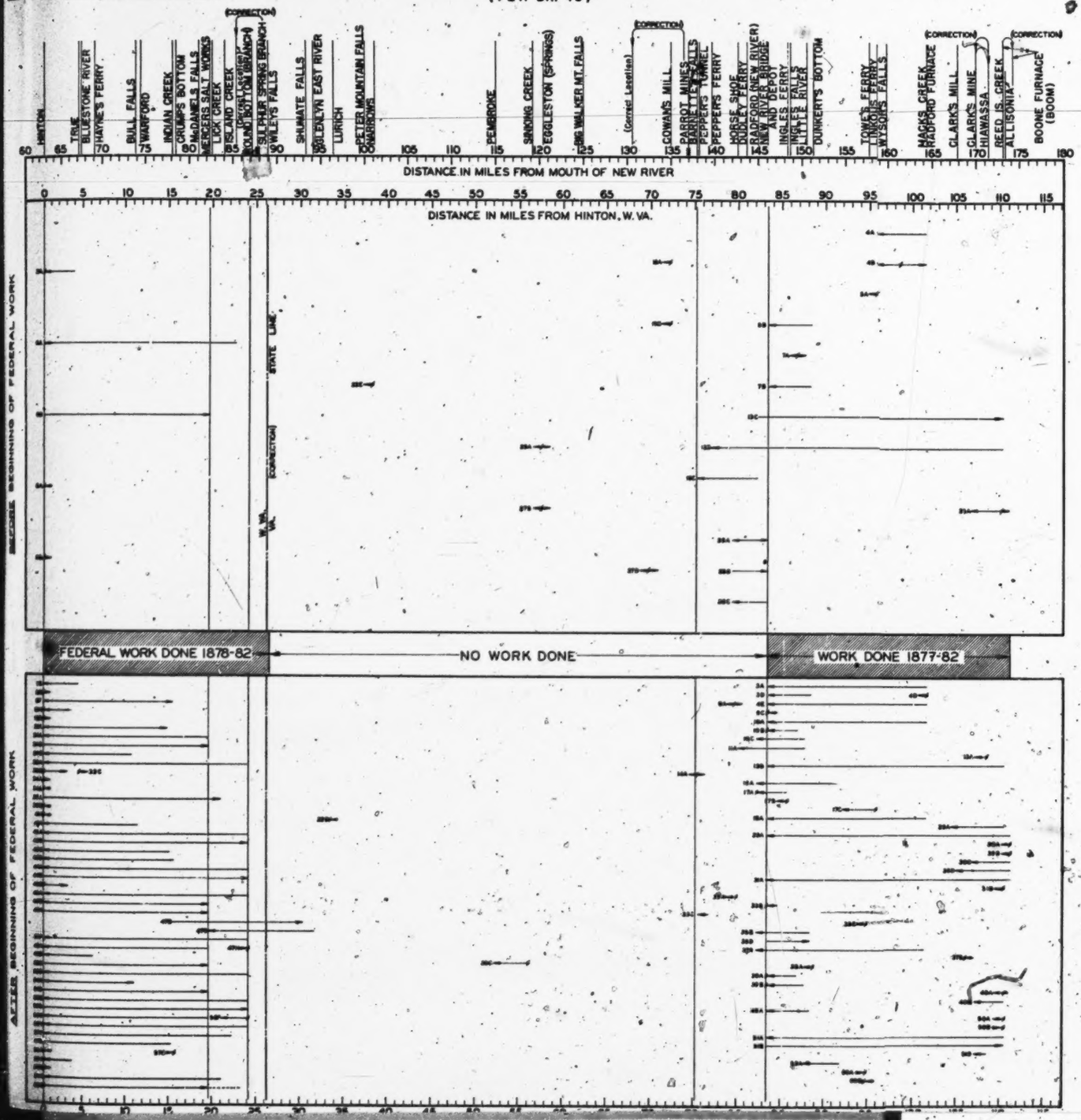
[1] As proof of susceptibility of practical navigation, petitioner cites the "stunts" of the witnesses Gerdes and Gragnon (Pet. Br. 54-55). On July 22, 1936, these witnesses launched a small boat with an outboard motor in the pool back of the London dam on the Kanawha River, navigated it up through the pool, pulled it for ¼ mile through a shoal, carried it around Kanawha Falls, boated up and down the pool behind the Kanawha Falls dam, loaded it on a

(*Footnote continued on next page*)

UNITED STATES
V
APPALACHIAN ELECTRIC POWER CO.
NO. 12, OCTOBER TERM, 1940,
U. S. SUPREME COURT

# RESPONDENT'S REVISION* OF PETITIONER'S CHART RE ALLEGED COMMERCIAL NAVIGATION ON NEW RIVER BETWEEN HINTON, WEST VIRGINIA AND ALLISONIA, VIRGINIA

(PET. BR. 48)




**LEGEND:**

←— = "Line" representing a boat or raft or logs alleged to have been seen at a given place, going in or coming from the indicated direction, but with distance of movement indefinite.

—— = Alleged movement between given points.

←— = Alleged direction of movement.

4A, 49B, etc. refer to tabulation in Petitioner's Appendix "B".

* **NOTE A:** As compared with Petitioner's chart, lines for which Petitioner's purported bases fall within one or more of the following categories have been appropriately eliminated, shortened or relocated†:

- I Incorrect use of testimony as actually recorded
- II Duplication
- III Hearsay
- IV Non-commercial items
- V Items based on testimony, lacking probative value—
  - (a) Testimony inconsistent with other evidence in the case.
  - (b) Testimony inconsistent with well-known facts.

* **NOTE B:** Certain lines, because they refer to the period after the beginning of federal improvement, have been transferred from the upper to the lower portion of the chart†.

† For numerical identification of the lines in point and pertinent citations to the record, see reverse hereof.

THE LINES ON THIS CHART CAN NOT BE ACCEPTED AS ESTABLISHING THE OCCURRENCE OF ALL OF THESE ALLEGED MOVEMENTS OF BOATS, RAFTS OR LOGS, OR THEIR WEIGHT AND SIGNIFICANCE IF THEY DID OCCUR. THE LINES NECESSARILY FAIL TO REFLECT MANY FACTORS, SUCH AS CREDIBILITY, OCCURRENCES AT HIGH WATER, DIFFICULTIES ENCOUNTERED, ETC., WHICH WOULD JUSTIFY OR REQUIRE THE REJECTION OR DISREGARD OF SUCH TESTIMONY BY A TRIAL COURT. (SEE TEXT, ADJACENT PAGE)

## Details of Respondent's Revisions re Alleged Commercial Navigation.

NOTE A: As compared with Petitioner's chart, lines for which Petitioner's purported bases fall within one or more of the following categories have been appropriately eliminated, shortened or relocated.†

* Some items (lines) fall under more than one category.

### I. INCORRECT USE OF TESTIMONY AS ACTUALLY RECORDED.

| *Line* | *Record* | *Line* | *Record* | *Line* | *Record* | *Line* | *Record* |
|---|---|---|---|---|---|---|---|
| 2B* | 482–5 | 15A* | 451 | 30C | 307 | 47C* | 372 |
| 4B* | 252, 253 | 16A | 270 | 31B | 239 | 47E* | 373 |
| 4D* | 253 | 16B* | 269, 270 | 32C* | 424–426 | 47G | 375 |
| 4E | 254, 186, 455 | 17B | 268 | 33B | 199 | 47H | 377, 378 |
| 5B | 455 | 18A | 446 | 33D* | 200 | 49C* | 487, 488, 490, 410 |
| 6A | 394, 395 | 19A* | 344 | 33E | 203 | 50A | 449, 450 |
| 6B | 394, 395 | 20A | 510–512 | 34A* | 480 | 50B* | 449 |
| 6E | 395 | 25B* | 296, 300 | 35A* | 271 | 56C | 348 |
| 7B | 430 | 27B* | 261, 262 | 39A | 186, 226, 228, 455, 291, 292 | 60A* | 203, 204 |
| 9A* | 189, 195 | 27C* | 261, 262 | | | 60B | 204 |
| 9C* | 194 | 27D* | 261, 262 | 40A | 335 | 61A | 464–466 |
| 11A | 434, 436, 189 | 28A* | 224, 225 | 41B* | 310, 311 | 62C | 234 |
| 11B* | 434–436 | 28D* | 227, 228 | 45A* | 412 | | |
| 12B* | 416, 417 | 30A* | 307, 309 | 47B* | 372, 1517, 1518, 1525, 1526 | | |
| 14A* | 205, 206 | 30B* | 307–309 | | | | |

### II. DUPLICATION.

| | | | | | | |
|---|---|---|---|---|---|---|
| 3B | (Duplicated by 3A) | 218–224 | 47E* | (Duplicated by 47A, 47D, 47B) | 372, 373 |
| 3E | (Duplicated by 3A) | 218–224 | 47J | (Duplicated by 47B) | 374, 383 |
| 9B | (Duplicated by 11A) | 189, 434, 436 | 49C* | (Duplicated by 49A) | 487, 488, 490, 410 |
| 11B* | (Duplicated by 11A) | 434–436 | 52B* | (Duplicated by 47B) | 320, 323, 324, 372, 1517, 1518 |
| 11C | (Duplicated by 28B) | 225, 435–436 | | | |
| 16B* | (Duplicated by 17A) | 267, 268, 269 | 54C | (Duplicated by 21A) | 472, 473, 407, 408 |
| 22D | (Duplicated by 22B) | 340 | 56A | (Duplicated by 47A) | 373, 348 |
| 23B | (Duplicated by 23A) | 437–439 | 56C | (Duplicated by 47D) | 348, 373 |
| 23C | (Duplicated by 23A) | 437–439 | 56D | (Duplicated by 47B) | 348, 361, 362, 372, 373, 1517, 1518, 1525, 1526 |
| 27C | (Duplicated by 27B) | 261, 262 | | | |
| 28D* | (Duplicated by 28A) | 227, 228 | 56E | (Duplicated by 47B) | 348, 349, 361, 362, 372, 373, 1517, 1518, 1525, 1526 |
| 37C | (Duplicated by 37B) | 235, 236 | | | |
| 41B* | (Duplicated by 41A) | 310, 311 | | | |
| 47C* | (Duplicated by 47B) | 372 | | | |

### III. HEARSAY.

| | | | | | |
|---|---|---|---|---|---|
| 2A* | 482–5 | 12B* | 416, 417 | 27D* | 261, 262 |
| 3A* | 218–224 | 13A | 215 | 28A* | 224, 225 |
| 4B* | 252, 253 | 14A* | 205, 206 | 28D* | 227, 228 |
| 4D* | 253 | 19A* | 344 | 30A* | 307, 309 |
| 9A* | 189, 195 | 25B* | 296 | 30B* | 307–309 |
| 9C* | 194 | 27B* | 261, 262 | 32C* | 424–426 |
| 11D | 435–436 | 27C* | 261, 262 | 34A* | 480 |

| | | | |
|---|---|---|---|
| 41B* | 310, 311 | | |
| 50B* | 449 | | |
| 52B* | 320, 323, 324 | | |
| 60A* | 203, 204 | | |
| 62A | 228 | | |
| 62B | 233, 234 | | |

### IV. NON-COMMERCIAL ITEMS.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 4C | 252, 253 | 22A | 339, 340 | 27A | 261 | 51C | 244–246 |
| 6D | 393, 1656, *et seq.* | 22C | 340 | 33D* | 200, 1660, 1661 | | |
| 15A* | 451, 453 | 25A | 296, 297 | 45A* | 412 | | |

### V. ITEMS BASED ON TESTIMONY LACKING PROBATIVE VALUE—

(a) Testimony inconsistent with other evidence in the case.

| *Line* | *Record* | *Line* | *Record* |
|---|---|---|---|
| 6C | 394, 395, 1650, 1652, 1654; Resp. Append. A 100-107 | 52A | 323, 319, 320 |
| | | 52D | 320, 323, 328, 394, 395, 1651 |
| 35C | 272, 1662 | 54B | 406, 408-411, 1650, Ex. 38, 2382, 2383 514 |
| 47B* | 372, 1517, 1518, 1525, 1526 | | |
| 47I | 272, 383, 372, 1517, 1518, 1525, 1526 | 55A | 398, 399, 400, 1651, 1672 |

(b) Testimony inconsistent with well-known facts.

| | | | |
|---|---|---|---|
| 1A | 458, 459, 460 | 3G | 218-224 |
| 2B* | 484, 485, Resp. Append. A 100-107 | 25B* | 1674 |
| 3A* | 218-224 | 27B* | 262, 266 |
| 3C | 218-224 | 34A* | 480, 1650, 1652 |
| 3F | 218-224 | 39A* | 271, 1562-1565 |

NOTE B: Certain lines, because they refer to the period after the beginning of federal improvement, have been transferred from the upper to the lower portion of the chart.

| | | | |
|---|---|---|---|
| 1B | 459 | 13A | Ex. 38, 2382, 2387, 514 |
| 2B | 482-485, 1650, 1652-1654 | 13B | Ex. 38, 2382, 2392, 514 |
| 3A | 218, 222 | 14A | 205 |
| 3D | 218 | 16A | 269, 270 |
| 4D | Ex. 38, 2382, 2392, 514 | 17A | 269, 270, 267, 268 |
| 4E | 254 | 17B | 267, 268, 271 |
| 6F | 391, 396 | 17C | 267, 268, 271 |
| 9A | 189 | 18A | Ex. 38, 2382, 2392, 514 |
| 9C | Ex. 38, 2382, 2392, 514 | 20A | Ex. 38, 2382, 2392, 514 |
| 10A | Ex. 38, 2382, 2392, 514 | 21A | Ex. 35, 2333, 2346, 514; 472, 473 |
| 10B | 279; Ex. 38, 2382, 2392, 514 | 22B | 340 |
| 10C | 279, 266, 269, 274, 276 | 24A | 410 |
| 11A | 189, 433 | 24B | 410 |
| 12A | 416, 417 | 24C | 410 |
| 12B | 416-417, 1650-1652, 1654 | 25C | 298 |

† *The item numbers hereinabove refer to the respective lines set forth on petitioner's chart (Pet. Br. 48) and the corresponding items in petitioner's tabulation (Pet. Appendix B, p. 178-184).*

* *Item (line) falls under more than one category.*

When petitioner's chart[1] (Pet. Br. p. 48) is corrected[2] to reflect *some, but not all,* of the factors enumerated by the Court of Appeals, it manifestly shows no appreciable use of the section between Round Bottom, West Virginia, and Radford, Virginia. Even if the testimony reflected by the lines on respondent's revised chart (opp. p. 50 hereof) could be accepted (as it can not) as establishing the occurrence of all of these alleged movements of boats or rafts or logs and could be considered apart from the other evidence in the case, they would afford no substantial basis for a finding of navigability. But it is plain that testimony may not be weighed and sifted by the egregious process of drawing lines upon a chart to represent the testimony of certain witnesses in such a manner as to attribute equal weight and credibility to the testimony of each such witness. Quite aside from the fact that such a process disregards the effect of the other clear and definite (but undiagrammed) evidence in the case, which clearly supports and indeed compels a finding of non-navigability, this curious method of weighing testimony wholly fails to reflect such things (many of

trailer and hauled it 6 or 8 miles to the pool above the Hawksnest dam, boated up and down the Hawksnest pool, loaded the boat on a trailer and hauled it to Hinton! (R. 1150-4). On July 19 and 20, 1936, Gerdes had attempted to run this small boat upstream from Hinton. While he did not disclose this effort on direct, it appeared on cross that he and his crew hauled the boat over Bull Falls, Harvey's Ledge, Wiley's Falls, Shumates Falls and Peters Mountain Falls (R. 941-3). How many other places does not appear, for he was not asked as to other points on cross or redirect. Finally, with all passengers in the boat attired in *life preservers,* on July 27th of a very hot summer, the witness testified that he got through Bull Falls in this small boat (R. 952-5)—at least nine days after he initiated the effort. It is significant that, apart from these "stunts" of the witnesses Gerdes and Gragnon, performed during the course of the trial in an effort to secure some evidence of navigability, not a single witness examined the river in a boat in preparation for his testimony, although that obviously would have been the most satisfactory method were it practicable. Even Gerdes did not make his alleged survey by boat but by automobile and on foot (R. 928-9).

[1] Essentially the same chart and accompanying tabulation (Pet. Br. 178) were also presented to the Court of Appeals.

[2] See also Resp. Append. A 130-5.

which can only be weighed by a Trial Court) as lack of veracity, obvious unreliability of memory, mental and physical condition, susceptibility to suggestion, innocent romancing, bias, the fact that an alleged trip was made, if at all, during unusual high water, the difficulties encountered, and the fact that trips such as the temporary and unsuccessful iron-boating, on the improved stretch above Radford, actually were proof of non-navigability.

Petitioner seeks to bolster its tabulation and diagram by quoting an alleged summary of such testimony from the dissenting opinion (Pet. Br. 49-52). It would seem sufficient to point out that both lower courts disagreed with this alleged summary of the dissenting judge. However, the quotation relied upon refers *only* to petitioner's Appendix II of evidence filed in the lower court (R. 2926-8), and is solely a summary of such portions of certain witnesses' testimony (often misconstrued or misstated) as are set forth in that appendix; it is not a summary of the record. Under the new rules of the Fourth Circuit, petitioner was permitted to attack the findings of the trial court by printing such selected excerpts from the evidence as, in the words of the rule, it desired the reviewing court to read, and petitioner took the fullest advantage of this rule by printing, in its appendix of evidence, only the most extreme statements of certain witnesses. By this process of sieving out all conflicting evidence of a like character, all other evidence of a higher order, and the qualifications, limitations and corrections in the testimony of the witnesses who had been thus selected, and by the further process of condensing the result as is done in the dissenting opinion, there is produced a recital which is grossly misleading even as a summary of only that part of the local non-expert testimony most favorable to petitioner's contention.

Manifestly, as the lower court said, this testimony had to be weighed by the trial court, and is to be weighed if at all by reviewing courts, not only in connection with other testimony of like character but also in connection

with the other definite evidence in the case. Thus, the physical characteristics of the river (erroneously stated in the dissenting opinion), the actual conditions encountered in the federal work undertaken in the most easily improved stretches of the river, the absence of any early use under conditions which would have compelled use of any feasible water transportation no matter how difficult, the testimony of expert and informed witnesses, the considered action of Congress and of the Corps of Engineers, the comparison with other streams such as the Kanawha, Colorado and Fox, and the progress reports of the engineers upon the federal work, all negatived navigability or susceptibility to navigation in this unimproved middle section. Since the clear and definite evidence in the case negatived navigability or susceptibility to navigation in this unimproved section, the correctness of hearsay and other unsatisfactory evidence of alleged use in this unimproved section was more than ordinarily suspect. But that the testimony relied upon in the dissenting opinion, and weighed only in the light of testimony of that character, was unworthy of credit, mistaken, misconstrued or contradicted, plainly appears from the following illustrations:

1. According to the dissenting opinion, the uncontradicted testimony shows substantial use of the section between Radford, Virginia, and Round Bottom, West Virginia, and alleged supporting instances of transporting staves, lumber products, etc., are cited (Pet. Br. 49-52). This testimony was not only largely hearsay and lacking in probative value on its face, but it was plainly contradicted. Petitioner's witness Wauhop, who had been engaged in the most extensive stave operation on the entire river, testified that the highest upstream from Hinton that he had ever cut staves was at Island Creek, West Virginia (some miles below Round Bottom) and that he found it impractical to boat them downstream from that point to Hinton and too far to wagon them to Glen Lyn (R. 464, 466). Witness Buckland cut staves which he hoped to boat *downstream*

from a point near Pendleton's ferry (at Round Bottom), West Virginia, but, finding this impossible, had to wagon them to Lurich, Virginia (R. 1510-1). Witness Adair was engaged in *wagoning* staves from Round Bottom to Glen Lyn (R. 1526). And the weight of this testimony was greatly increased by the uncontradicted evidence that the difficulties and expense of wagoning over extremely bad roads were so great as to compel the use of any available water transportation no matter how difficult.

2. Other testimony is cited in the dissenting opinion to show boating of tobacco from Glen Lyn to Hinton for shipment by rail (Pet. Br. 49-52). Petitioner's witness Dickinson, who lived on a farm on New River between Glen Lyn and Wiley's Falls, testified that he and those living in Virginia always *wagoned* their tobacco to a point two or three miles below Round Bottom, West Virginia, i. e., to a point about ten miles below Glen Lyn, for transportation by water to Hinton (R. 394-5). Nothing could more squarely deny the existence of any practical use of the river for boating tobacco higher upstream than this point.

3. The dissenting opinion also cites testimony purporting to show the transportation of fertilizer from Glen Lyn downstream. Again petitioner's witness Dickinson, who used fertilizer frequently on his farm on New River below Glen Lyn, testified that it was *never brought to him except by wagon* (R. 391-5). Indeed, petitioner's witness Peters never testified that he took more than *one* load of fertilizer down from Glen Lyn—and that sole trip was made, *if at all*, during high water in the Spring (R. 328). But in the dissenting opinion this becomes testimony that the witness "worked on the river in boats for 16 or 18 years, that *in the Spring* he would go up the river to Glen Lyn to get fertilizer" (Pet. Br. 52).

4. The dissenting opinion states that "The witness Coleman operated a *steam boat* for six or seven months from Pepper's Ferry to Pepper's Tunnel" (Pet. Br. 51). This incident occurred when Pepper's tunnel, which was inac-

cessible by road, was being constructed by the Norfolk & Western Railroad. As a construction maneuver, to get materials and supplies to this job, an upright engine was mounted on a flat boat at Pepper's Ferry (the point of nearest access to a highway), and this was used to ferry material two miles down and across the river to the tunnel mouth. And in order to permit this ferrying operation it was necessary to dig the channel out for the two miles between Pepper's Ferry and Pepper's Tunnel before any hauling could be done (R. 202; 1652). Is it contended that, if it is physically possible to ferry a stream even by digging a channel for the ferry, such fact establishes navigability of the stream in its natural and ordinary condition and does so not only in the excavated portion but throughout its course?

5. Other testimony cited in the dissenting opinion is alleged to show that timbers and other supplies were boated from Hinton to Glen Lyn for railroad construction. Even though the matter of getting supplies to inaccessible places in railroad construction is a construction maneuver (analogous to moving a house a short distance on rollers) in which physical possibility and not practical use is the test, this testimony is completely refuted. Instead, the situation was that some railroad grading was done along the improved stretch of river below Round Bottom, West Virginia, presumably for the purpose of holding a franchise, although the railroad was never completed (R. 378; 1652). The evidence shows that, whereas any supplies which may have been transported by boat from Hinton were taken to this railroad grading operation in West Virginia; all materials and supplies (including bridge timbers) for railroad construction at Glen Lyn, Virginia, were transported by land (see Appendix A 101-7).

6. The dissenting judge, as evidence of commercial use, states that the witness Owen testified to carrying the Government boats down to Hinton for sale after the federal work was abandoned above Radford. While this also was

only a construction maneuver, not a commercial movement, it does show that there was no market for these small boats higher up the river than Hinton. The report of the resident Army Engineer, praising the man in charge of this maneuver "for the energy and ability displayed in this movement," discloses that "after much difficulty" he succeeded in *floating these boats downstream* in 29 days—reflecting progress of less than 2.7 miles per day! (Ex. 39, R. 2401). The movement was in the Spring (March and April) when "the water was high," and "There was a right smart tide" (Owen R. 249). Here, as in general where reliable testimony was available, the testimony relied upon by the dissenting judge and the petitioner was shown to be grossly erroneous and contradicted by known facts.

7. Although it is uncontradicted that no work was done between New River Bridge at Radford and about Wiley's Falls at the State line, some of these witnesses testified to seeing wing-dams and other artificial improvements at all the rapids and falls in this unimproved section and even to seeing work being done there! (R. 346-8; 303, 305; 220-1). There was some temporary intrastate boating in short stretches above Hinton and Radford after the federal work had been done there. Significantly, however, none of those engaged in such boating above Radford were known to those engaged in such boating above Hinton and *vice versa*. This, of course, would have been incredible if there had been any boating between Radford and Hinton.

The foregoing is, we think, sufficient to show the erroneous character of the alleged summary quoted by petitioner.

5. *Comparison of New River with the rivers involved in the cases upon which petitioner principally relies, establishes that New River is not navigable in the Allisonia-Hinton reach or elsewhere in its course.*

In support of its claims that the Allisonia-Hinton reach is navigable, petitioner repeatedly cites *United States* v.

*Utah*, 283 U. S. 64; *The Montello*, 11 Wall. 411, 20 Wall. 430; *Economy L. & P. Co.* v. *United States*, 256 U. S. 113 (Pet. Br. 58, 62, 63, 64, 66). A comparison between the physical characteristics and commercial use of the streams involved in those cases in their natural and ordinary condition with the physical characteristics and absence of commercial use of New River in its natural and ordinary condition confirms the fact, shown by the evidence and found by both lower courts, that New River is not navigable in the Hinton-Allisonia reach or elsewhere in its course.

On Plate I, at the end of this brief, are shown the profiles of the New and Kanawha Rivers and of those parts of the Colorado, Grand, Green and San Juan Rivers, the navigability of which was the subject of judicial determination in *United States* v. *Utah, supra*. Not only does Plate I show that the slope of New River is *throughout* very much steeper than the slope of those parts of the Colorado and Green Rivers which were held navigable in the *Utah* case (indicated by hatching under the profiles), but also that its slope is quite comparable to that of the San Juan River which was held non-navigable. Furthermore, the Master found that the Colorado River had been the subject of commercial use in the mining industry, whereas no use was ever made of New River by such industries even though lead and iron mines and furnaces were located on its very banks.

The *Montello* and *Economy* cases involved links in the two finest and most extensive inland waterway systems on the continent, to wit, the Great Lakes-Fox-Wisconsin Waterway to the Mississippi River system and the Great Lakes-Desplaines-Illinois River Waterway to the Mississippi River system. Both these great waterways had been practically utilized in commercial navigation from the settlement of the continent for a period of more than 150 years (indeed, continuously to the time of the Montello and since, in the case of the Fox route). We have hereinbefore pointed out the complete absence of any such use of the New River.

On Plates II and III, at the end of this brief, there are shown the profiles of the New and Kanawha Rivers and of the Great Lakes-Fox-Wisconsin and Great Lakes-Desplaines-Illinois River routes to the Mississippi River system. Mere inspection of these Plates shows that, while the slopes of the relatively short difficult stretches of the Fox and Desplaines were comparable to the slope of the *entire New River,* these short difficult stretches were in each instance merely a single concentrated difficult stretch, involving a relatively minor obstruction to, and interruption of, navigability in a continuous waterway extending over 3000 miles with almost limitless reaches of excellent water and navigation on either side. It was, of course, this circumstance which made tolerable and practicable the portaging over a short distance on the lower Fox and on the Desplaines. On the other hand, where obstruction to, and interruption of, navigability are continuous, navigation is obviously impracticable if not impossible.

If, as petitioner says and the reports show, these short difficult reaches in the Fox and Desplaines could not be passed except by portaging, a mere inspection of the profiles on Plates II and III shows that portaging would be required—not occasionally but continuously—throughout the entire length of New River. Manifestly such conditions preclude practical navigation and foreclose any finding of navigability in fact.

Both petitioner and the dissenting Judge refer to the Tennessee River (Pet. Br. 67; R. 2935) as apparently supporting some inference that New River is navigable. The vide difference between the physical characteristics of the New and Tennessee Rivers is strikingly revealed by their profiles on Plate IV at the end of this brief. The slope of 5.93 feet per mile in the 14 miles of Big Muscle Shoals (which the Board of Army Engineers states *"was entirely un-navigable"*, H. D. 781, 60th Cong., 1st Sess., p. 5, par. 4) is of the same order as the slope of 5.5 feet per mile in the 40-mile section of New River above Round Bottom,

Vest Virginia. However, the slope of the remaining 24 iles of Muscle Shoals is only about 2 feet per mile; the verage slope of the entire Tennessee from Knoxville to aducah (652 miles) is *only 0.79 feet per mile; 0.45 feet per* ile from its mouth to the foot of Muscle Shoals (255 iles); *0.76 feet* per mile from the head of Muscle Shoals Knoxville (359 miles).

All of the foregoing comparisons plainly establish that ew River is not navigable either in the Allisonia-Hinton ection or elsewhere throughout its course.

***All considered action of Congress and the War Department sustains the conclusion that New River is non-navigable.***

None of the Army Engineer Reports relating to the ederal work on New River, to which petitioner refers (Pet. r. 42-4), deal with the question of navigability, but merely ith the possibility of creating, or the progress being made the attempt to create, artificial navigability in certain cal intrastate reaches.

The alleged report (Pet. Br. 44) of the Chief of Engineers that the river was navigable, was in fact only a ply to a personal inquiry of a Congressman, and merely ates that "it would appear that the action heretofore ken by Congress [referring to the appropriations of 77-1886] has indicated its opinion that New River is a avigable water of the United States" (Ex. 47, R. 2429). part from these reports, petitioner refers to three letters om the Secretary of War to two members of the Congress nd a private individual. Their casual character is apparent and they only say federal permission would be necesry for a dam in New River either because of the old ongressional appropriation (see above) or because it is "interstate stream" (R. 2431-2, 2457-8, 2453).

In contrast, a greatly abbreviated summary of the *considered* action of Congress and the War Department in respect of New River is as follows:

The appropriations by Congress for the creation of artificial navigability in New River were abandoned after 1886 (Ex. 528, R. 2759). In 1902 it repealed the Act creating the project and ordered the unexpended funds returned to the Treasury (32 Stat. 331, 374). In 1912, after making another survey, the Chief of Engineers, concurring with the Board of Engineers, the Division Engineer and the District Engineer, recommended against any attempted improvement of New River (Ex. 46, R. 2419, 2420, 2425-6). In a report made by the Chief of Engineers in 1916, it was stated that "there has been no useful navigation on New River at any time, and none is possible under existing natural conditions" (Ex. 566, R. 2844). In 1925 the Chief of Engineers officially reported that New River is not navigable (*Ex. 572,* same text Ex. 97, R. 2528-32).

In 1927 the Federal Power Commission so found (Ex. 91, R. 2492-4). In 1930 the Corps of Engineers made three official reports (one to the Federal Power Commission) that New River is not navigable *at any point in its course* (Ex. 539-B, R. 2795-6; 579-B, R. 2858; 579-C, R. 2863). In 1930 the Federal Power Commission certified to the Attorney General of the United States that "New River is neither navigated nor navigable in fact" (Exs. 531, R. 2779).

No dam upon New River has ever had any navigation facilities. The Corps of Engineers in 1930 reported that no permit was required for bridges (one at Glen Lyn), a most significant recommendation in view of the customary attitude of playing safe and assuming jurisdiction, at least temporarily, whenever there is any possible doubt (Exs. 579-B, 579-C). Eloquent evidence that Congress did not consider New River to be navigable is the fact that petitioner is now condemning lands for the construction of its Bluestone dam 150 feet high at a point 3 miles above Hinton, which dam will have no locks or navigation facilities and would therefore be a complete barrier even to local navigation to the railroad at Hinton, if that stretch was even locally navigable (Ex. 145, R. 2677; R. 2899, 2909; see also foot-

note, p. 43, *supra*). Indeed, the very conditions for the alleged protection of navigation, incorporated in the license tendered to respondent, which petitioner in this case would require respondent to accept, *relate only to the navigable Kanawha* and have no application to, and make no mention of, the non-navigable New River (Ex. 131, Article 15, R. 2670).

The sole conflicting instance is the self-serving declaration of the Federal Power Commission on October 12, 1932, when, in the midst of litigation over the Radford project and in complete disregard of the official reports of the Chiefs of Engineers, Generals Taylor in 1925 (*Ex. 572*, Ex. 97, R. 2528) and Brown in 1930 (*Ex. 539, B*, R. 2795-6), it undertook to reverse its previous finding of non-navigability for the purpose of trying to gain an advantage in the litigation (R. 2513-15; 140; 2912).

**D. Petitioner's argument that the intrastate stretch between Allisonia and Radford is "a channel of interstate commerce", and consequently a navigable water of the United States, is without basis in fact or law.**

Petitioner contends that, even though New River below Radford is non-navigable, the Allisonia-Radford stretch above is "navigable waters of the United States" because "a substantial commercial traffic was formerly shipped downstream to Radford and out of the state by railroad" (Pet. Br. 73, 74).

The sole factual basis for this argument is the unsuccessful experiment (conducted off and on from December 1881 to some time in 1882 or 1883) in boating charcoal-iron down to New River Bridge from two of the 16 furnaces tributary to the artificial improvement in that stretch. (See pp. 41-2, *supra*.) This iron was subsequently wagoned to the railroad station called New River Depot (R. 244) and shipped by rail, some part of it in interstate commerce. The result of this experiment, we think, plainly established that this stretch was not locally navigable even after the artificial federal improvement.

However, assuming *arguendo* that the stretch was then navigable intrastate, petitioner's argument that consequently it is a navigable water of the United States is plainly unsound and squarely refuted by the case which petitioner cites, namely, the *Daniel Ball* (Pet. Br. 74). That case makes it clear that navigable waters of the United States, in contradistinction to navigable waters of the States, are those waters which are navigable in fact and

> "form in their ordinary condition *by themselves*, or by *uniting with other waters*, [not by uniting with railroad nor by uniting with wagon roads which in turn unite with railroads] a *continued* highway * * * over which commerce * * * with other states * * * is conducted by *water*." (10 Wall. 557, 563)

Similarly in *The Montello*, 11 Wall. 411, this Court, in passing upon this precise contention, said:

> "It (the Fox River) can only be deemed a navigable water of the United States when it *forms, by itself* or by its *connection* with other *waters*, such a highway. * * * If, however, the river is *not of itself a highway* for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is *only navigable between different places within the State*, then it is not a navigable water of the United States, but only a navigable water of the State * * * "

and further:

> "The fact that the steamer * * * was engaged in commerce between the States, does not affect the question under consideration [i. e., whether Fox River is a navigable water of the United States] * * * " (p. 415).

To the same effect, see *United States* v. *Utah*, 283 U. S. 64, 75.

Here again petitioner merely confuses the issue by injecting an argument (Pet. Br. 74-75) as to whether, and if so to what extent, Congress may regulate *interstate commerce*

upon an intrastate navigable water—a question quite beside the point on the issue whether a stream is a navigable water of the United States. Moreover, since 1883 there has not been, and it is conceded that there is not now, any such "alleged commerce" upon this stretch (R. 2919; Ex. 579B, R. 2860, Par. 8; 2898). Whatever may be the power of Congress to regulate *interstate commerce upon* an intrastate navigable water (and that is a question not germane to any issue in this case), it would be difficult to predicate such regulation upon a commerce which does not now exist, has not existed for over 50 years and, so far as can be foreseen, never will exist in the future.

## POINT II

**The courts below did not err in finding that neither the construction nor operation of the Radford project will substantially interfere with navigation on, or impair the navigable capacity of, any navigable waters of the United States.**

Petitioner, disregarding the finding concurred in by both lower courts as well as most of the evidence upon the issue, asserts that the operation of respondent's project will impair the navigable capacity, *first*, of an allegedly navigable stretch of New River between Hinton, West Virginia and Glen Lyn, Virginia, and, *second*, of the Kanawha and Ohio Rivers (Pet. Br. 79-88).

The first assertion is disposed of by the fact that, as both lower courts found, New River is not a navigable water of the United States at any point in its course (See Point I). However, despite petitioner's assertion, respondent does not concede that the operation of respondent's project would impair the navigable capacity of the Hinton-Glen Lyn stretch even were it navigable; and the Court of Appeals specifically found that "there is no satisfactory

proof that the operation of the defendant's dam will in fact impair even possibly existing present capacity for navigation" in the Hinton-Glen Lyn stretch (R. 2909). Indeed, the fact that this claim is wholly without substance clearly appears. Petitioner is seeking to condemn lands for the construction of its Bluestone project, which, were this stretch navigable, would be a complete barrier to navigation (See p. 60, *supra*). The conditions incorporated in the tendered license for the alleged protection of navigation relate specifically to the navigable Kanawha and have no application to the non-navigable New River. (Ex. 131, Art. 15, R. 2670.)[1]

The navigability of the Ohio River and of the Kanawha River to a point about five miles below Kanawha Falls is undisputed (Ex. 600, R. 2874-E). The adverse effect, if any, of the operation of respondent's project would be greater in the case of the Kanawha River than in the case of the more distant Ohio River,[2] as petitioner conceded below, and this issue may therefore properly be regarded as narrowed to the navigable portion of the Kanawha River.

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[1] It may be noted that, while the finding that New River is not navigable at any point in its course is based upon the judicial and constitutional definition of navigable waters, the definition of navigable waters in Section 3(8) of the *Power Act excludes waters which are not presently used or susceptible of use* under present conditions and modes of transportation by water. See pages 33-4, *supra*. As the dissenting judge said: "The impairment of a theoretical navigable capacity would not constitute a basis for requiring a license if the interests of commerce were not affected; * * * (R. 2924). It is conceded that there is not now, and for many years has not been, navigation of any character on any part of this stretch and, of course in fact there never was navigable capacity in that part of this stretch which extends from Glen Lyn, Virginia, well down into West Virginia, whatever may have been the situation for a few miles above Hinton, West Virginia. (See pp. 42-3, 45-6, *supra*.)

[2] The lack of substance in this belated claim of impairment of navigable capacity of the Ohio River is emphasized by the fact that the Bill did not even allege, and was never amended to allege, that operation of respondent's project would impair the navigable capacity of that river (R. 4-12).

The burden of proving that the operation of respondent's project would substantially impair navigable capacity rested upon petitioner. *U. S.* v. *Rio Grande D. & I. Co.*, 174 U. S. 690. Both courts below found that neither the construction nor operation of respondent's project will impair the navigable capacity *of the Kanawha River or of any navigable water of the United States.* (R. 133, 153, 156, 2904, 2908, 2909.) We submit that the evidence, reviewed by the lower courts in their opinions, establishes that the finding is supported by substantial evidence and precludes any serious consideration of this question (R. 128-133, 2904-2909). Therefore, any extended review of the voluminous evidence on this issue seems unnecessary and unwarranted. However, some of the evidence on this issue, due to its scientific and technical character and other reasons, is not susceptible of summary review; and, if the court should be interested in a more detailed analysis, it will be found in the separately bound Appendix A to this brief at the points indicated by cross-references hereinbelow.

**A. Petitioner had the burden of proving that the INTENDED ACTS of respondent would substantially impair the navigable capacity of navigable waters.**

Petitioner sought anticipatory relief against the *intended acts* of respondent. These intended acts consisted of (1) the construction of a dam with appurtenances for the generation of electricity on the non-navigable New River at a point about 160 miles above the head of navigation on the Kanawha River and (2) the operation of these structures for the generation of electricity. The petitioner had the burden of proving either (1) that the mere erection of these structures, regardless of how they are used, would substantially impair the navigable capacity of distant navigable waters (and no such claim has been or could be made), or (2) that the *intended or contemplated use* by respondent (i. e., its *intended acts*) would produce that result.

It was not enough for petitioner to say, or even to prove, that it could conceive of a way in which the structures could be manipulated so as to impair navigable capacity. Petitioner had to establish that such impairment would follow from the use which the respondent intended to make, i. e., *the things which respondent intended to do.* This follows from the settled rule that, where a structure is not a nuisance *per se* and the alleged nuisance depends upon the manner in which the structure is used, relief may not be granted unless it clearly appears that the alleged nuisance will be the necessary or practically certain result of the use which the defendant intends to make. *Connecticut* v. *Massachusetts,* 282 U. S. 660, 673-4; *Missouri* v. *Illinois,* 180 U. S. 208, 248; *Blease* v. *Safety Transit Co.,* (C. C. A. 4th) 50 F. (2d) 852, 856; *Meyer* v. *Somerville Water Co.,* 82 N. J. Eq. 572, 576-7; *Pennsylvania Co.* v. *Sun Co.,* 290 Pa. 404, 138 Atl. 909, 912.

These principles apply with full force to a suit by the United States for anticipatory relief against an alleged threat of impairment of navigable capacity of navigable waters of the United States. *United States* v. *Rio Grande D. & I. Co. supra.* In that case the United States sought to enjoin construction of a dam and irrigation works, on the upper Rio Grande River, which necessarily contemplated the *permanent diversion* and *loss* of a substantial part of the flow of the stream. This Court, in reversing the decree, directed the lower court:

> "* * * to order an inquiry into the question whether the *intended acts of the defendants* in the construction of a dam and *in appropriating the waters* of the Rio Grande will *substantially diminish* the navigability of that stream *within the limits of present navigability,* and if so, to enter a decree restraining those acts *to the extent they will so diminish.*" (*loc. cit.* 710.)

Neither the lower courts nor the respondent stated, as petitioner pretends to believe (Pet. Br. 85, 88), that the

test under this rule is whether the defendant intends to create a nuisance, but, as the Court of Appeals stated, whether the necessary or practically certain result of the intended acts of the defendant will be to create a nuisance, whether a nuisance be intended or not. (R. 2908).

**B. The finding concurred in by both the courts below, that the operation of respondent's project will not impair the navigable capacity of any navigable water of the United States, is supported by evidence not only substantial but conclusive.**

It is, we think, conceded that the construction of a dam on a non-navigable stream cannot *per se* affect the navigable capacity of any navigable water. (R. 128-9), and that the only conceivable way in which respondent's project could impair navigable capacity elsewhere would be by the manner in which the flow of the river is passed through the powerhouse or over the dam.

The United States has no property or other right under the commerce clause in the natural flow of a stream, navigable or non-navigable. Subject to the authority of the Federal Government to preserve navigable capacity, the right to control or regulate the natural flow of streams resides in the States. Proof that an alteration in natural flow will substantially impair navigable capacity of some federal navigable water is a *sine qua non* of the existence, and delimits the extent, of any right or authority of the United States to restrain or restrict an alteration in natural flow under State authority. (See pp. 109, 110, 113-17, *infra.*)

Consequently, the issue is, not whether the natural flow of the stream will be altered by the intended acts, but solely whether such alteration in natural flow, if any, as will result from the intended acts of respondent will cause a substantial impairment of navigable capacity in the Kanawha River. (See pp. 109-10, 116, *infra.*) Petitioner asserts (Pet. Br. 81-83) that the operation of respondent's project would impair the navigable capacity of the Kanawha and Ohio Rivers during allegedly "critical low-water periods" (1) by dimin-

ishing the flow of those streams, as the result of a maximum weekly (Sunday) shutdown of 34 hours (only contingently possible), to such an extent as substantially to impair their navigable capacity, and (2) by varying the flow through the power house or past the dam so as to produce tides or so-called "waves" in the Kanawha River, approximately 160 miles below, of such size and character as to interfere with navigation. Petitioner below based both of these contentions upon assumptions which, as both courts found, have no foundation in respondent's intended acts. (R. 129-130; 2904-2906). Although petitioner's contentions were thus entirely theoretical and moot, the Trial Court found that "even this (theoretical) possibility is denied by the evidence." (R. 134.)

1. *As the lower courts found, the intended acts of respondent will not diminish the flow so as to impair the navigable capacity of the Kanawha or Ohio Rivers during allegedly "critical low water periods".*

Petitioner's contention is that the operation of respondent's project might impair navigable capacity of these streams during allegedly "critical low water periods". (Pet. Br. 81-3.)

The evidence established, *first*, that, although wholly unrelated to respondent's intended acts, a complete shutoff of all contribution or flow from above the damsite even if continued indefinitely during an extreme low water period, would not impair navigable capacity of these streams, and, *second*, that the intended acts of respondent will increase the low-water flow of these streams every season and particularly during allegedly "critical low water periods."

*No inference of impairment may be drawn from the size or character of respondent's installation.* Contrary to petitioner's attempted implication (Pet. Br. 77-8), there is nothing about the size or character of respondent's project which supports an inference that respondent's

acts will impair navigable capacity. The ratio between installed hydraulic capacity and the assured low water flow is smaller in the case of respondent's project than in the case of the power projects at the Government navigation dams on the Kanawha River, without any allowance for the water used for navigation at the Kanawha dams, and hence not available for power. (See pp. 7-8, *supra.*) Respondent's project has been constructed at the site and upon the plans which were approved by the Secretary of War and Chief of Engineers from the standpoint of navigation and by the Federal Power Commission as best adapted for utilization of the waters for navigation, commerce, water power and other beneficial uses (Ex. 131, R. 2664-5; Ex. 90-A, R. 1245, 2027). The economic and engineering feasibility of respondent's intended acts, which the evidence established and the lower courts found would not impair navigable capacity, is therefore established and was conceded in the District Court (Pl. (Pet.) Br. on Motion to Strike Answer, p. 149).

*Even a complete shut-off of all contribution from above the damsite during a low-water season, an assumption wholly unrelated to respondent's intended acts,*[1] *would not*

[1] In an effort to make some showing of an alleged threat of impairment through diminution of water supply during low-water seasons, petitioner in the Trial Court relied upon the anomalous contention that, by arranging to fill the reservoir during the extreme low-water period of an extremely dry year instead of during the season of high flow, it would be physically possible to impound such extreme low flow, for a period of five or six weeks, with the result of depriving the streams below of any contribution from above the damsite. The evidence established that such a physically (but not rationally or practically) possible manipulation would destroy the value and defeat the very purpose of a power reservoir, which is to increase the firm or dependable capacity of the power plant during low-water seasons (which determines its dependable capacity throughout the year), and that such manipulation would be without relation to any intended acts of respondent, to any practical operation or to common sense. (R. 130, 131, 1955-7, 2040-5, 1320-5). This chimerical claim was abandoned by the petitioner in the Court of Appeals; however, due to this irrelevant

(*Footnote continued on next page*)

*impair navigable capacity of these streams.* The uncontradicted evidence established that the maximum amount of water needed or useful for navigation on the Kanawha River under present conditions does not exceed 150 s. f. and would not exceed 200 c. f. for double the present commerce (R. 2064-6); that, even if commerce increased so as to utilize the maximum theoretical capacity (practical capacity and its water requirements would be much less) of the Kanawha River (an assumption wholly unjustified), not more than 500 s. f. would be needed or useful for navigation (R. 1794-7); that, in the recently granted licenses for power developments at the Kanawha navigation dams, the Army Engineers reserved only 250 s. f. for all other purposes including navigation uses (R. 2219-21, 2105); and that, with no contribution from above the damsite, there would still be more water than would be needed or could be used for navigation on the Kanawha River even during extreme low water (R. 1968-9; 2066; *Ex. 572*, text same as Ex. 97, R. 2532).

The uncontradicted evidence also established that, with the use of the Ohio River to its maximum theoretical capacity, which would involve a manifold but highly improbable increase in present commerce, the minimum flow of the Ohio River just above the mouth of the Kanawha (at old Dam 25) alone would supply more than twice the amount of water needed or useful for navigation (R. 1794-7; *Ex. 601*, p. 146, par. 263; *Ex. 603*, 1st col. of flows).

While, as hereinafter appears, respondent's project will in fact increase the low water flow of these streams, it was thus shown, as General Taylor, Chief of Engineers, officially reported in 1925, even when the old dilapidated, leaky dams

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contention of the petitioner, in the Trial Court, evidence was received which, as that court found, established that even such an irrelevant or irrational assumption would not result in any impairment of navigable capacity (R. 130, 131, 133, 134). In the lower court and here petitioner has been compelled to rely upon a modified, though still unwarranted, claim that on the occasions (only contingently possible) of week-end (Sunday) shutdowns navigation would be deprived of all contribution from above the damsite.

(now replaced) were in the Kanawha River, that "*it would not be possible* to operate the proposed project so as *to adversely affect navigation on the Kanawha River* under the existing project" (*Ex. 572*, same text Ex. 97, R. 2532).

*Respondent's project will increase low water flow every season and particularly during allegedly "critical low water periods."* During the low water season of every year, the Radford project will substantially increase the average low-water flow below the damsite and in extremely dry years will increase such flow from a minimum of 600 s. f. to an average of 1230 s. f. (R. 1321-2). While stressing this circumstance in its argument on the applicability of the Power Act, the petitioner, in its argument on impairment of navigable capacity, studiously omits all reference to this undisputed and important fact.

*Petitioner's allegedly undisputed evidence.* Under the heading "The undisputed evidence", petitioner argues (1) that during allegedly "critical low-water periods" New River at the damsite had on one occasion (September, 1930) contributed as much as 70 per cent. of the flow of the Kanawha and on another occasion (August, 1918) 38 per cent. of the flow of the Ohio below the mouth of the Kanawha; (2) that week-end (Sunday) shutdowns of respondent's project (only contingently possible) would cut off these respective percentages of the flows of these streams for 34 hours during allegedly critical low-water periods; (3) that there is great difficulty in maintaining project depths on these streams during low water and (4) that consequently navigable capacity of these streams will be impaired (Pet. Br., 81-83). It should be sufficient to point out that the record establishes that even a permanent shut-off of all flow at the damsite would not impair navigable capacity of these streams. (See pp. 69-70, *supra*). However, each of the foregoing premises is untrue and naturally the conclusion is erroneous.

Contrary to the implication of petitioner's heading, the record shows that the flow figures for the Ohio (mere esti-

mates and not measurements, R. 1436-41) used in petitioner's computations are not only contradicted but grossly erroneous. (Cf. R. 1421 with *Ex. 602*, 1st col. of flows and *Ex. 601*, p. 146, par. 263) Similarly the flow figures used by petitioner for the damsite and the mouth of the Kanawha were mere estimates in the making of which different records and dates erroneously chosen were used with the result of obtaining an abnormal and disproportionately higher flow at the damsite and smaller flow at the mouth of the Kanawha (R. 567-78).

In addition to taking erroneous and discredited flow figures, petitioner has selected a short period during a low-water season (in August, 1918) when there was a freshet on the New and Kanawha Rivers but none on the upper Ohio, so as to obtain a temporarily distorted but immaterial relationship between the flows of the Kanawha and Ohio. Thus, the flows used for the damsite and the Kanawha are respectively 2260 s. f. and 4737 s. f. (R. 559, 1317) in comparison with natural low-water flows of 600 s. f. and from 1000 to 1100 s. f. respectively, (R. 1012). On the other hand, the erroneous flow figure used for the Ohio is approximately 50 per cent. of the lowest recorded flow of that river (*Ex. 602*, 1st col. of flows).

An even more serious defect in petitioner's argument is the wholly unsupported and unsupportable assumption that, even if petitioner's flow figures were correct, the operation of respondent's project would, under the conditions assumed by petitioner or otherwise, deprive the Kanawha and Ohio Rivers of contribution from above the damsite. The evidence on this subject is too detailed for brief review; but the fundamental and vital error in petitioner's assumption is easily shown by considering the following case of extreme low-flow—when, if ever, the matter of contribution from above the damsite would be material.

Accepting *arguendo* the excessive estimate of petitioner's witness that the effectiveness of a 57 hour shut-off would reach a brief peak of 75 per cent. (R. 803) at the mouth of the Kanawha, the effectiveness of a 34 hour shut-off (the maxi-

mum contingently possible in respondent's operations) would reach a brief peak of 45 per cent.,* leaving at least a residual of 55 per cent. of the previous flow. It is undisputed that the extreme low flow at the damsite is 600 s. f. and that respondent's project will increase this low-water flow by an average of 630 s. f. If such an extreme low flow continued for a week, the average flow below the damsite, with respondent's project in continuous operation, would be 1230 s. f. If a maximum shut-down of 34 hours did occur in such a week of extreme low flow, the utilization of the available water during the remaining 134 hours of the week (as is, of course, the purpose of a power reservoir) would result in an average flow of 1540 s. f.; and the contribution from above the damsite to the flow at the mouth of the Kanawha would never fall below approximately 850 s. f. even at the brief height of maximum effectiveness of such a shut-off, except for which the contribution from above the damsite, with respondent's project in operation, would be still larger. This contribution would compare with the natural contribution of 600 s. f. And, accepting *arguendo* the corresponding excessive estimate of petitioner's witness (R. 803), the minimum contribution from above the damsite at Kanawha Falls (somewhat above the head of navigation) during such an assumed week of extreme low water would not fall below approximately 770 s. f., in comparison with the natural flow of 600 s. f.

Since any effect of respondent's project upon water supply during allegedly critical "low-water periods" would be beneficial, petitioner's assertion that there is great difficulty in maintaining project depths on the Kanawha and Ohio Rivers during low water would be immaterial, were it true. Consequently, while the assertion is refuted by the overwhelming weight of the evidence, it seems unnecessary to burden the Court with a review of the testimony on that subject. It is based on the disputed, contradicted and largely discredited testimony of its own witnesses. The

* Effectiveness for 34-hour shut off assumed directly proportional to that estimated by petitioner's witness for 57-hour shut off, although it would not unlikely be somewhat less.

testimony of Dr. Mead, Colonel Scheidenhelm, and Major Putnam and the Report of General Taylor, Chief of Engineers, fully refute the contention. (See pp. 69-70, *supra*). In addition, the failure of petitioner to call, and its refusal to permit to appear, Colonel Conklin, the U. S. District Engineer in charge of these waters, completely discredits the claim (R. 75-82, 515, 557). However, in case the Court is interested, this and other evidence relating to factual errors underlying petitioner's argument, under the grossly misleading heading "The undisputed evidence", is reviewed in Appendix A, Part II-A.

2. *As the lower courts found, the intended acts of respondent will not create so-called "waves" or tides which will impair the navigable capacity of the Kanawha River.*

The issue of impairment in this aspect has no relation to any alleged diminution of navigation project depths which, on a canalized river like the Kanawha, cannot be reduced below the project level unless the water supply is reduced below the requirements for navigation. We have previously shown that such a result is impossible (See pp. 69-73, *supra*). Indeed, in the Trial Court petitioner, obviously recognizing these facts, relied chiefly upon a curious claim that so-called "power waves" from Radford would cause seiches (i. e. oscillations—R. 129), in the navigation pools on the Kanawha, which would cause the pools to "dip" below project levels. The evidence showed this claim to be so baseless that it was abandoned in the Court of Appeals. The sole issue is whether the operation of respondent's project will produce tides or so-called "waves" in the Kanawha River, approximately 160 miles below, of such size and character as to interfere with navigation. Both courts below specifically examined this question and found against the petitioner (R. 133; 2904). That finding is plainly supported by evidence not only substantial but conclusive.

About 160 miles of tortuous river, involving a succession of innumerable shoals, falls, ledges, pools and rapids, sepa-

rate respondent's project from the head of navigation on the Kanawha River, the nearest navigable water of the United States (R. 2906; 128). General Taylor, then Chief of Engineers, officially reported that it would not be possible, by any physical manipulation of the project works, wholly without basis in any practical operation or in the intended acts of respondent, to affect adversely navigation on the Kanawha River (*Ex. 572*, text same as Ex. 97, R. 2532). Indeed, petitioner's witness, Colonel Watkins, had officially reported that "power tides or waves" discharged directly into navigation pools do not adversely affect navigation on a fully canalized stream (R. 1036, 1037-8) like the Kanawha.

Some variation in the flow through a power plant is normal and customary due to the variations in power load, and such variation is often called "peaking". Thus the power station at the Government Bluestone project is intended to have peaking operation and the plants at the Kanawha dams *are now operated upon a peaking basis* (R. 130-1; Ex. 145, R. 2707-13, 2679-80; R. 2073-6, 2063-4; Ex. 263, R. 2750-2). The hydraulic capacity of the installations at the Kanawha navigation dams is the same as at respondent's project, but the ratio between the hydraulic installation and the assured low flow is larger at the Kanawha dams than at Radford, and the power plants at the Kanawha dams *discharge directly into the navigable waters.*

The practical and intended operations at respondent's project are of the same character and order of magnitude as the actual operations of the power plants at the Government navigation dams on the Kanawha River (Ex. 145, R. 2679-80; 2075-76, 2063-4; Ex. 263, 2750-52). Obviously the Army Engineers and the Federal Power Commission are not permitting, let alone deliberately causing, impairment of navigable capacity on the Kanawha River in order to develop power at these dams. Any contention that similar operations at Radford, Virginia, about 160 miles above the head of navigation, would impair navigable capacity of the Kanawha River, is plainly without

substance.[1] Indeed, the evidence established that the size and rate of any variations in flow which will exist in the Kanawha will be determined by the operations of the Government licensed projects on the Kanawha and not by the respondent's project (R. 2062-3).

The evidence discloses that neither the volume nor rapidity of the variations which could be produced in the Kanawha by any manipulation of the Radford project, much less by the intended acts of respondent, would even remotely approach the magnitude or rate of the variations which, the evidence disclosed, would have no effect upon navigable capacity (R. 1864-9, 1872-3, 2055, 2058-63, 1787-94) or which are established by the Government for the operation of the power projects at the Kanawha navigation dams which discharge directly into navigable waters (R. 2192). For a more detailed review of this evidence, see Appendix A, Part II-B.

These conclusions were fully supported by the comprehensive series of "wave tests" made in 1930 on the New and Kanawha Rivers by respondent in cooperation with Colonel Ardery, United States District Engineer, and the United States Geological Survey. In these tests the power stations and spillway gates at the Buck and Byllesby plants were simultaneously thrown wide open to produce the largest possible tide or wave and involved discharges as great as 15,000 s. f., or approximately 167% of the maximum

[1] Neither the lower courts nor the respondent reasoned (as petitioner pretends, Pet. Br. 87, footnote 12) that, because the Government permits power development under regulation at its navigation dams on the Kanawha River, *a fortiori* power development at respondent's project 160 miles upstream on New River will not impair navigable capacity. The point is that the regulations for the operation of the power projects at the Kanawha dams provide for, and the actual operations of such power projects discharging directly into the navigable waters produce, variations in flow many times exceeding in extent and rate of change any variations which it would be physically possible to produce in the Kanawha River by *any* manipulation of respondent's project 160 miles upstream, although without basis in respondent's intended acts.

hydraulic capacity of the Radford project, and produced approximately the "block" form of wave, which is the most persistent but which cannot occur in practical operation (R. 2047-52, 836-7, 1860-1, 1872). Contrary to petitioner's implication (Pet. Br. 84), some of these waves as they passed the damsite were of substantially the same order of magnitude as any wave which could be produced by the upper limit of any operations intended by respondent (R. 2057, 2121). Of course the effect of a "wave" does not depend upon the size of the reservoir from which it is emitted (as petitioner erroneously implies, Pet. Br. 84) but upon the size and form of the wave itself. Colonel Scheidenhelm testified, and it was stipulated that Colonel Ardery would testify, that these operations produced no interference with navigation or navigation works on the Kanawha (R. 2055, 1828-9) and they could not be detected in a rowboat or by the eye (Ex. 544; R. 775, 1859, 2056-7).

Indeed, the description of these tides or variations in flow as "waves" is misleading, and petitioner's reference to its reproduction of Ex. 227, if intended to be considered as a picture of these so-called waves, is even more misleading and unjustifiable (Pet. Br. 83). The vertical scale (representing the variations in gauge heights) on that reproduction of Ex. 227 is *2 feet to the inch*, while the longitudinal scale (representing the distance up and down stream) *averages about 96 miles, or roughly 500,000 feet, to the inch.* By the time the typical waves in the 1930 wave test reached the head of navigation their front had an average slope of 5 inches in about 20 miles, or *one-fourth of an inch per mile*, and their back had an average slope of 5 inches in about 80 miles, or *one-sixteenth of an inch per mile* (R. 2121-2). A ripple caused by a vagrant breeze would be more noticeable. It would be quite as reasonable to describe as a "hill" a section of a highway which rose 5 inches in a distance of 20 miles and then fell 5 inches in 80 miles. Such slopes would not even permit drainage.

The finding was also supported by actual tests which were made by the witness Professor Thomas, head of the Hydraulics Department of Carnegie Institute and consultant for the Army Engineers on such problems, at the power plants at the Government navigation dams on the Kanawha River and by his integrating model tests, which are the most advanced and precise method of pre-determining the behavior of irregular flow of water (R. 1850-53; 1862-9). It is a significant fact that the respondent offered the only witnesses who had ever made any tests upon these rivers, although petitioner had at its command the former U. S. District Engineer, Colonel Ardery, who participated in one of the tests, but refused to call him or permit him to appear (R. 77-82).

Since the finding is plainly supported by substantial evidence, it seems unnecessary to analyze the testimony of the two subordinate employees of Col. Conklin (cited by petitioner, Pet. Br. 85, 87) as to alleged difficulties of navigation and groundings on the Kanawha River. However, the testimony is plainly irrelevant. Manifestly, none of the alleged difficulties or groundings could have been caused by any operations of the uncompleted Radford plant. Moreover, an analysis of the evidence shows that none of these difficulties was caused even by the operation of the power plants on the Kanawha and that, to the extent that they really occurred, they were due to over-loading in certain portions of the old 6-foot project on the Kanawha during the period when that project was being replaced by the existing 9-foot project and other like causes (R. 2125-6; 2132-3; 2128; 2167-8). The absence of any claim of groundings on the Ohio River not only confirms the fact that the groundings in the Kanawha were the result of overloading in the old 6-foot project on the Kanawha, but also shows that the power operations in the Kanawha had not produced any groundings in the Ohio, despite the fact that the changes in flow produced by power operations in the Kanawha were many times greater than it would be physically

possible to produce in the Kanawha by any conceivable manipulation of the Radford project. For a fuller discussion of this evidence, see Appendix A, Part II-C.

*The compensatory effect of downstream dams.* Petitioner expressly conceded in its brief on certiorari (p. 23), as it still impliedly concedes, that the courts below were correct in finding as a fact that power waves will be substantially dissipated before they reach the Kanawha River, but now asserts that this finding was based, erroneously, upon the compensatory effect of downstream dams (Pet. Br. 85-7). Of course, the finding of the lower courts is not based upon the existence or operation of any intervening dams. The Kanawha Falls dam of the Electro-Metallurgical Company is a run-of-the-river plant which does not affect stream flow. There were no other intermediate dams in 1930 when there were made the "wave" tests which produced no effect upon navigation or navigation works in the Kanawha River, or when General Taylor made his official report in 1925 (see pp. 7-9, 76, *supra*). This and other evidence established, and the lower courts found, that there would be no adverse effect upon navigable capacity regardless of intermediate dams (R. 133; 2904, 2059). It is true that both courts adverted to the obvious fact that the construction of the Bluestone dam will make it physically impossible for respondent's project to have any effect on the Kanawha; but the finding was not based on that circumstance (R. 133, 2904, 2059).

In any case, however, inasmuch as the operation of respondent's project will not impair the navigable capacity of any navigable water, it is immaterial whether that fact arises out of its distant location and the nature of respondent's intended acts or is prevented by the presence of other downstream dams whether constructed by respondent or others. Petitioner's authority is limited to preventing an actual impairment of navigable capacity. So long as that constitutional fact does not exist, petitioner is without au-

thority in the premises, regardless of the reasons for the non-existence of that essential fact.

Petitioner inquires rhetorically, what would be the situation in the case of a succession of dams, above the head of navigation, where the cumulative effects might be to impair navigation (Pet. Br. 87). The answers are simple and plain. *First,* the effect of such a succession of dams with reservoirs (and if they are run-of-river projects they do not affect the flow of the stream) is controlled by the dam furthest downstream, independently of the operation of the upper dams. In other words, petitioner's assumption that the effects are cumulative is an egregious error. *Second,* if the downstream dam did in fact cause an impairment of navigable capacity, its operation could be restrained or restricted; but that would not vest any authority in the petitioner to regulate upstream dams which do not impair navigable capacity. *Third,* even if, contrary to the fact, it were assumed that the effect of such dams would be cumulative, it would still follow that the authority of the petitioner to restrain or restrict any of them would not arise unless and until such a succession of dams were constructed and so operated that their cumulative effect would actually impair navigable capacity.

The petitioner then argues that the fact that respondent's project will not impair navigable capacity is due to the existence and operation of the navigation dams and power plants in the Kanawha River and that consequently it should be held as a matter of law—a sort of legal fiction—that navigable capacity of the Kanawha River is impaired even though the record conclusively establishes that such is not the fact and that such effect, if any, as accrues on the Kanawha River, as petitioner argues later in its brief for another purpose, is *beneficial* to navigation.[1] Petitioner

[1] The court below did not "suppose" that the Kanawha navigation dams "can be so operated as largely to compensate for any fluctuation in the water flow which respondent's project is apt to

(*Footnote continued on next page*)

can no more than any private person sustain an action for injunctive relief without proof of actual or imminently threatened injury. *In re Debs*, 158 U. S. 564, 592-3, 584-5. There is no proof that the operation of respondent's project would impair the navigable capacity (such as it might be) of the Kanawha River if that river were unimproved. But that is a speculative and moot case not before this Court. When and if ever the navigation dams in the Kanawha River are removed, it will be time enough to consider whether any impairment of navigable capacity would result under those conditions.

However, impairment of navigable capacity is a question of fact under existing conditions. *U. S.* v. *Rio Grande D. & I. Co.*, 174 U. S. 690. It is to be determined upon the basis of physical conditions as they actually exist, and not upon the basis of hypothetical non-existing conditions. Actual impairment is a *sine qua non* of the existence of any constitutional authority (See pp. 111-6, *infra*), and it is also an express requirement of the statutes which petitioner invokes. Section 23 of the Federal Power Act applies only where "the interests of interstate or foreign commerce *would be* affected" and clearly refers to actual or present conditions. Section 10 of the Rivers and Harbors Act likewise applies to a present or existing condition, which this Court recognized in the *Rio Grande* case by stating the

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cause" (Pet. Br. 86). The only evidence considered by the court dealt with actual operations of the Government dams and power projects before respondent's project was completed or in operation. Moreover, the evidence shows that conditions in the Kanawha River do not, and will not, depend upon the operation of respondent's project but solely upon the operation of the projects at the Government dam, entirely independently of whether respondent's project were ever built or how it should be operated. (See p. 76, *supra*.)

The United States does not, merely because it has improved a navigable stream, lose the right to prevent impairment of navigable capacity thereof. On the other hand, it does not by virtue of such improvement either acquire control of projects on non-navigable streams which do not impair navigable capacity or otherwise extend its constitutional authority.

question to be whether the permanent diversion there involved would interfere with "navigable capacity within the limits *where navigation is a recognized fact*" (*loc. cit.* 709) and by remanding the case for a determination of whether such diversion would "substantially diminish the navigability of that stream within the limits of present navigability." (Cf. *New Jersey* v. *New York*, 283 U. S. 336, 344.)

In truth, petitioner's argument rests upon the fallacy (apparently indulged by the dissenting judge, R. 2938) that under the commerce clause the United States has some right in the natural flow of a non-navigable stream which permits it to insist upon that natural flow, in derogation of the right of the States and their citizens, even though there be no impairment of navigable capacity. Plainly, however, the rights of the Federal Government are limited to the prevention of such a change in natural flow as will substantially impair navigable capacity of federal navigable waters. (See pp. 111-116, *infra*).

*Method of operation.* Petitioner also asserts that the concurred in finding is erroneous because, as petitioner unjustifiably implies, it is based upon an "intention not to impair navigable capacity" (Pet. Br. 88). There is a wide distinction between a mere "intention not to impair navigable capacity" and the fact that, as both lower courts found, the result of respondent's intended acts (not its purpose with respect to navigation) will not impair navigable capacity. It is the latter which is the controlling fact, as was specifically pointed out and applied by the Court of Appeals (R. 2908). Manifestly, if the result of the "intended acts" of respondent would be substantially to impair navigable capacity, it would be immaterial that respondent does not intend to impair navigable capacity. But, just as clearly, petitioner could not sustain its burden by proving that, although the intended acts of respondent would not cause any impairment of navigable capacity, the result of conceivable other acts which respondent does not

intend or threaten to do, would be to impair navigable capacity. And petitioner failed even to prove that such moot and hypothetical acts would impair navigable capacity (R. 130, 134).

## POINT III.

**Neither the construction nor the operation of respondent's project violates the Rivers and Harbors Act of March 3, 1899.**

Since, as both lower courts found, New River is not a navigable water of the United States and respondent's project will not impair the navigable capacity of any federal navigable water, plainly neither the construction nor operation of respondent's project violates the Rivers and Harbors Act of March 3, 1899, c. 425; 30 Stat. 1151. As the lower courts held, that statute is simply inapplicable. *United States* v. *Rio Grande D. & I. Co.*, 174 U. S. 690.

## POINT IV.

**The lower courts correctly held that the Power Act (both as originally enacted and as amended) does not purport to authorize or require a Federal license for respondent's project.**

Under Point V we show that, if the Act were construed as applicable to respondent's project, it would be to that extent unconstitutional and void; but we here examine the question whether the Act, construed in the light of recognized canons of statutory construction, purports to authorize or require a Federal license for such a project. It is the position of respondent:

*First:* That, upon the facts of this case the Power Act is so plainly inapplicable that no question of construction or interpretation is presented.

*Second:* That petitioner's argument, that Section 23 applies to respondent's project because of its incidental beneficial effect upon navigation, is without substantial factual support in the record and erroneous as a matter of law.

*Third:* That the Power Act, properly construed, is not applicable to any project on a non-navigable stream.

*Fourth:* That, assuming *arguendo* that the Act could be construed to require some license for respondent's project, it should be construed as requiring only a minor-part license with conditions limited to the regulation of flow for the protection of navigation.

*Fifth:* That, upon such latter interpretation, petitioner would, upon the undisputed facts of this case, be barred from any relief.

**A. On the facts of this case, the inapplicability of the Power Act is not debatable and in fact conceded.**

Both the lower courts found that respondent's project is not located in navigable waters and will not impair navigable capacity or affect an interest of interstate commerce. (R. 133, 156, 2904.) These findings, as we have shown, are supported by substantial evidence; and consequently they determine the only factual bases upon which any interpretation of the Power Act is involved, or permissible, in this case.

A mere reading of the Act, and particularly Section 23, plainly shows that there is no conceivable interpretation under which the Act would be applicable to respondent's project upon the facts found by both lower courts; and the petitioner so conceded in its petition for certiorari (16-17) and in the court below. (Pet. Supp. Br. below, 236-7.)

**B. Contrary to petitioner's contention, Section 23 does not authorize or require a license for respondent's project because, although located in a non-navigable stream and not impairing navigable capacity, its incidental effect upon navigation is beneficial.**

Petitioner, shifting its position on this point for the third time in the litigation over this project and for the second time in the instant suit,[1] contends in this court for

[1] In the first suit, petitioner construed Section 23, as respondent did and still does, as creating a procedure for resolving doubt as to the navigability of a stream and relied on the alleged navigability of New River as a basis for its jurisdiction. (See note 2, p. 98, *infra*.) In the instant case, the only effect on interstate commerce asserted by petitioner in its Bill or in the District Court as being within the purview of the Act, was the alleged impairment of navigable capacity, and not a single finding requested by petitioner upon the issue of "effect" was directed to anything other than an alleged impairment of navigable capacity and consequently to effect upon "the interests of interstate commerce as related to navigable waters of the United States". (R. 94-8, particularly Req. Fdg. 53.)

In the Court of Appeals petitioner *for the first time* asserted that "effect on interstate commerce" includes matters unrelated to navigation or navigable capacity. (R. 2916; Pet. Sup. Br. below,

*(Footnote continued on next page)*

the first time that Section 23 authorizes and requires a license for respondent's project merely because its incidental effect, if any, upon navigable capacity, or upon flood control as related to navigation, is beneficial. (Pet. Br. 93, 94, 103, 109.) We think the petitioner may not thus shift its position and advance a new theory of its case in this Court (*Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 38-9; *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-8; *Kimble* v. *Kiser*, (C. C. A. 4th) 59 F. (2d) 626, 628); but in any event the contention is both without adequate factual basis and erroneous in law.

We agree with petitioner that the scope of petitioner's constitutional authority in relation to flood control is not involved in this case (Pet. Br. 102, footnote 28), and we, therefore, do not discuss that question.[1] Whatever may

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Spec. of Errors V, pp. 10, 11.) None of the matters urged in the Court of Appeals related to beneficial effects—the theory now advanced. (Pet. Br. below 55-7; Pet. Sup. Br. 138-43.) These contentions, advanced in the Court of Appeals without support of the Bill, in the record or in law, were rejected both by that court and by the dissenting judge (R. 2909-14; 2924) and were abandoned in the Petition for Certiorari; and petitioner disclaims any attempt again to raise those contentions here, as it obviously could not on its petition. (Pet. Br. 103, footnote 30.)

Shifting its ground again, petitioner now contends in this court for the first time that Section 23 applies to a beneficial effect. (Pet. Br. 93, 94; Cf. Pet. Br. below 55-7; Pet. Sup. Br. below, 138-142.)

[1] However, we flatly deny that petitioner (as asserted in its brief in *Oklahoma* v. *Woodring*, 60 S. Ct. 725 (1940)), has any constitutional authority under the General Welfare Clause directly to construct a flood-control project or to engage in any other activity as a *federal enterprise* for which independent authority may not be found in the substantive enumerated powers granted to the Federal Government. (*United States* v. *Butler*, 297 U. S. 1, 64; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 292; *Helvering* v. *Davis*, 301 U. S. 619, 640; *United States* v. *Certain Lands*, 78 F. (2d) 684, appeal dismissed 297 U. S. 726.) This does not in any wise limit the financial aid which the Federal Government may contribute to the solution of flood problems, but it does defer to the constitutional requirement that action by the Federal Government "must be made in a manner consistent with the authority granted by the Constitution" (*Schechter Corp.* v. *United States*, 295 U. S. 495, 550) and avoids what would otherwise be a grave breach in our dual constitutional system.

be the constitutional authority of petitioner with respect to flood control it could not acquire respondent's lands for a flood control project except upon condemnation and payment of just compensation. It could neither take respondent's lands without compensation for that purpose nor require respondent to construct, or devote its property to, a flood-control project without compensation.

*Lack of factual basis for petitioner's contention—any beneficial effect indirect, incidental and insubstantial.* It is well-settled that petitioner may not regulate intrastate matters because of indirect or incidental adverse effects upon interstate commerce (see pp. 93-4, *infra*); and manifestly, if petitioner had authority to regulate intrastate matters because of beneficial effects (as it has not, see p. 91-5, *infra*), an indispensable factual basis would be that the effect should be direct and substantial. All of petitioner's evidence and requested findings were directed to a contention that the effect of respondent's project would be adverse (R. 94-98). These alleged adverse effects included impairment of navigable capacity, interference with plans of petitioner "now formulated and *to be formulated*" for flood control and prevention of soil erosion and an alleged threat of injury to federal improvements in the Kanawha River (R. 16-17, Pars. 27-8). The Trial Court found against petitioner on these issues (R. 156). There was, and can be, no contention that petitioner has any plan to construct, and much less has authorized construction, of a project of any character at respondent's site (Bill R. 16-18). No evidence was offered to support the allegation that respondent's project would interfere with any plan of petitioner "formulated" or "*to be* formulated", or that respondent's project would damage property of petitioner; and any such claims were abandoned in the Court of Appeals. (Pet. Supp. Br. below 9-14.)

The District Court, dealing only with this alleged but unproved plan "formulated and to be formulated", found that the effect, if any, of respondent's project upon flood

control "will be helpful". (R. 133.) The Court of Appeals, in noticing and rejecting the now abandoned and unfounded contention (R. 132-3) that respondent's project might in some way interfere with the operation of the proposed Bluestone Reservoir, merely observed that respondent's project would seem to be "a help rather than a hindrance in this respect". (R. 2909.) Petitioner has in this respect specified error only as to the failure of the court below to hold that for this reason respondent's project affects interstate commerce and must be licensed (Pet. Br. 19, Spec. 5),[1]—a contention not made in the court below. (Pet. Sup. Br. below, 5-14.)

It is true that such effect, if any, as respondent's project has on either navigability or flood control will be beneficial. But it is also true that any such effect is indirect, incidental and insubstantial.

An incidental effect of respondent's project will be to increase the extreme low-water flow by 630 s. f. At extreme low water—the time when the effect would be greatest and the only time when it could be material—this would increase the depths below the London Dam (the upper dam on the Kanawha River) by the insubstantial amount of less 1/5 of an inch (R. 1304; Ex. 116, R. 2639). This apart from the fact that enrichment of the water supply, even in low-water seasons, is not needed or useful for navigation (See p. 69, *et seq., supra*) and consequently affords no substantial benefit to navigation.

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[1] While petitioner is thus foreclosed, not only by the concurrent finding of the lower courts but also, by its failure to specify any error in their finding that respondent's project will not adversely affect flood control, it may be noted that the alleged evidence which petitioner cites in support of a hypothetical possibility of adverse effect on floods (Pet. Br. 109, footnote 42) is merely testimony of two of its own witnesses (that of one, contradictory and unreliable on its face, and that of the other, the bare assertion of an unqualified witness) who, the Trial Court found, had "displayed a bias and evasiveness, and an unwillingness to admit even obvious facts hostile to their contentions, to such an extent as to deprive their testimony of much value". (R. 131.) Cf. Testimony of Dr. Mead, R. 1991-2.

It is thus apparent that, even if petitioner's contention were legally sound, as it is not, it would lack substantial basis in fact. As we shall show, even a substantial benefit to navigable capacity or interstate commerce created incidentally by an intrastate activity (or by an interstate activity, for that matter) of a citizen does not subject the citizen to the burden of maintaining such benefit in perpetuity or to being prohibited from using his property unless he will submit to burdensome regulations by petitioner. Nevertheless, it may be noted in passing that the argument of petitioner, based upon a hypothetical set of facts, finds no support in the facts of this case and in addition is legally irrelevant (Pet. Br. 99).

Petitioner, departing from its Bill, the record and its contentions in the courts below, engages in an academic discussion of Ohio River flood control and in a wholly unsupported and largely erroneous exposition of the operation of flood-control systems and power projects (Pet. Br. 106-11). While these academic discussions outside the record are quite immaterial to any issue before this Court, it seems appropriate to point out *some* of the express and implied errors included in the discussion.

Petitioner's reference to the cost of navigation improvements in the Ohio and Kanawha Rivers is not only unsupported by the record but patently irrelevant. Those in the Ohio are outside the scope of the Bill. The allegation of threatened damage to petitioner's works in the Kanawha was never supported by any evidence, found against petitioner by the Trial Court (R. 133, 156), abandoned in the Court of Appeals and omitted from petitioner's specification of errors in this Court (Pet. Br. 18-19). We are not here concerned with the question whether a system of tributary flood control reservoirs is the best means of controlling floods in the Ohio Valley or whether the construction of such a system is within any constitutional authority of petitioner. Assuming both premises, they furnish no support for the contention that petitioner may therefore prohibit

respondent from using its lands unless respondent will construct a flood-control reservoir, rather than a power plant, without compensation.

Petitioner cites certain recommendations by the Army Engineers for the construction of a series of flood-control dams on tributaries of the Ohio River and also the authorization of certain flood-control projects by the Flood Control Acts of 1936, 1937 and 1938 (Pet. Br. 106-8). Neither a recommendation nor an authorization for a flood-control project at respondent's site would support a contention that respondent's lands may be taken without compensation to implement such plans or authorizations or that respondent may be prohibited from using its lands unless it will construct a flood-control project without compensation. But, *none of the plans or Flood Control Acts cited by petitioner recommended or authorized any project* (flood-control or other) *at respondent's site.* Moreover, the report of the Army Engineers (charged with the administration of Flood-Control Acts) on the Kanawha Basin, including New River, shows that they never contemplated such a project and that they never contemplated flood control in connection with respondent's project (*Ex. 145*).

However, that the incidental beneficial effect, if any, upon navigation, by way of flood control or otherwise, must be negligible does clearly appear from the report cited by petitioner. In that report, H. D. 306, 74th Congress, 1st Session, the Corps of Engineers examined a plan for a system of *80 reservoirs* (including the Bluestone Reservoir) on the principal tributaries of the Ohio and estimated to cost $574,900,000. The Corps of Engineers reported that the total annual benefits which would accrue to navigation upon the entire Ohio River from the construction of this vast, costly system of reservoirs, would be only about $5,000 per year (*Ex. 601,* pp. 93-4, Par. 135). The report also discloses that *no* benefit to navigation in the great Kanawha basin would accrue from the construction of the proposed Bluestone Reservoir on the New River near Hin-

ton, West Virginia (*Ex. 601*, p. 94, Table 27; p. 183, table 53). Most of the projects included in this plan were, of course, genuine flood-control reservoirs and even the Bluestone Reservoir, though largely a power project, included a substantial flood-control reservoir superimposed on the power project (See pp. 8-9, *supra*). It is thus manifest that, while the incidental effect of respondent's project upon flood control, if any, will be helpful, that beneficial effect will be not only indirect and incidental, but also insubstantial.

The question then is whether Section 23, properly construed, purports to prohibit a riparian owner from developing water-power resources on a non-navigable stream without a federal license, imposing the burdensome restrictions and obligations of the Power Act, solely because an indirect and incidental result of the use of his property will be to create such insubstantial and negligible benefits to navigation, by way of flood control or otherwise. Of course, the repeated statement of petitioner (Pet. Br. 109, 111, 112) that, if it were permitted to regulate respondent's project, it might enforce some manipulation of the project not intended by respondent and which would increase the incidental benefit to flood-control, is nothing more than a bald assertion of a right to take respondent's property without compensation. It would be as reasonable to assert a right to regulate the use of any land in the United States because it *could* be used for a post-office, fort, arsenal, or other federal purpose.

*Petitioner's contention, that Section 23 applies to projects on non-navigable streams the effect of which, if any, is beneficial, is erroneous as a matter of law.* We think it clear that the Power Act, properly construed, does not apply to non-navigable streams, that it merely authorizes the Commission to issue licenses for projects on navigable streams and that the finding under Section 23 "that the interests of interstate or foreign commerce would be affected by such proposed construction" is merely a statutory formula for determining whether or not the project

is in navigable waters.[1] However, if Section 23 may be construed as applying to a project on a non-navigable stream in any circumstances, then it is perfectly clear that "effect upon interstate commerce", as used in the Act, must be construed as meaning only an adverse effect.[2]

The very purpose of the Power Act, *which did not prohibit anything*, was to provide a means more convenient than a special act of Congress for giving federal assent in certain of the cases where required under the Rivers and Harbors Act of March 3, 1899; and such assent was required, if at all, for a project on a non-navigable stream only if it impaired navigable capacity. *United States* v. *Rio Grande D. & I. Co., supra.* The Power Act is therefore not merely in *pari materia* with the Rivers and Harbors Act but purely complementary to that Act. Since the Rivers and Harbors Act obviously dealt only with impairment of navigable capacity, that is, with an adverse effect, under the plainest principles of statutory construction, the Power Act, were it applicable at all to projects on non-navigable streams must be similarly construed.

Moreover, petitioner's contention would lead to absurd consequences and attribute a ridiculous intent to Congress. Between 1920 and 1935 the filing of a declaration under Section 23 was purely discretionary. If no declaration was filed, a project was obviously subject only to the prohibitions of the Rivers and Harbors Act; and plainly under that Act a project on a non-navigable stream is lawful unless it substantially impairs navigable capacity. *United States* v. *Rio Grande D. & I. Co., supra.* Petitioner thus

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[1] See Point IV-C, *infra.*

[2] The Power Act does not even mention flood control; and, despite petitioner's labored argument (Pet. Br. 102-4), both its legislative history and language make clear that it has nothing to do with flood control. However, the question is here moot; for it is plain that, if, contrary to our contention, the Power Act could be construed as applicable to projects on non-navigable streams, then "effect upon interstate commerce", as used in that Act, must be construed as meaning only an adverse effect.

attributes to Congress an attempt to impose burdensome regulations and ultimate loss of his property upon a citizen who undertook to ascertain whether his project, unless Federally authorized, would violate the Rivers and Harbors Act, whereas the project would be perfectly lawful and free from such burdens if he did not so undertake to ascertain. Plainly no such absurd and discriminatory intent can fairly be attributed to Congress.

There is not a scintilla of evidence in legislative history to support any such contention. The Committee Reports, as petitioner in effect concedes (Pet. Br. 96, footnote 23), furnish no support for the contention. Nor do the Reports or Debates upon the 1935 Amendments.

Petitioner argues that the alleged contrast between the language of the Rivers and Harbors Act and that of Section 23 establishes a Congressional intent to require a license for a project on a non-navigable stream even though its incidental effect upon navigation is solely beneficial. (Pet. Br. 95.) What has already been said, with reference to the construction of the Power Act in *pari materia* with the Rivers and Harbors Act, fully refutes this contention. But the contention rests also upon a complete misconception of the meaning of the phrase "effect upon interstate commerce" as it has been consistently used and understood by Congress and construed by this Court.

Obviously, neither the construction nor operation of a power project on a non-navigable stream (or on a navigable stream for that matter) is interstate commerce. (See p. 119, *infra*.) Any constitutional authority of petitioner under the commerce clause to regulate matters which are not interstate commerce, or instrumentalities of interstate commerce, is dependent upon establishing *as a fact* that such intrastate matters or activities have a direct and substantial *adverse* effect upon interstate commerce and that the proposed federal regulations are necessary for, and have a real and substantial relation to, the protection of interstate commerce from substantial injury flowing from such intra-

state acts. (*Schechter Corp.* v. *United States*, 295 U. S. 495, 546; *Labor Board* v. *Jones & Laughlin Co.*, 301 U. S. 1, 31-2, 36-7; *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U. S. 453, 463-9; dissenting opinion Cardozo, J. in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 327-8.) (*United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 408, 410-11; *Stafford* v. *Wallace*, 258 U. S. 495, 523-4, 528.)

This interpretation of the phrase rests not only upon the obvious limitations of the commerce clause but upon the fact that any other construction would plainly destroy our dual system of government.

In *Stafford* v. *Wallace, supra*, this Court said:

> "As already noted, the word 'commerce' when used in the act is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce *prejudicially*. *Thus construed* and applied, we think the act clearly within congressional power and valid." (*loc. cit.* 528.)

To the same effect see *Labor Board* v. *Jones & Laughlin Co., supra*, 31. The petitioner can no more sustain an action for injunctive relief than any private person upon mere proof of a threatened benefit. It must prove a threatened injury. (*In re Debs*, 158 U. S. 564, 583, 584-5.)

That "effect upon interstate commerce" as a basis for federal regulation of intrastate matters means *an adverse effect* has been consistently recognized by Congress throughout the course of legislative history. For illustration, cf. Sections 9 and 10 of the *Rivers and Harbors Act* of 1899 and see Section 1 of the *Flood Control Act* of 1936 (quoted Pet. Br. 105); *National Labor Relations Act*, 29 U. S. C. 151, 152, 160; *National Industrial Recovery Act*, 15 U. S. C. 701; *Federal Wages and Hours Act*, 29 U. S. C. 202; *Bituminous Coal Act* of 1937, 15 U. S. C. 828; the *Anti-Trust Act*, 15 U. S. C. 1. It is thus apparent that the phrase,

"effect upon interstate commerce", has been consistently understood and used by Congress and construed by this Court to mean an *adverse effect*. Consequently, there is no basis for the construction urged by petitioner. There is nothing in legislative history to indicate that the phrase in Section 23 was used in other than its usual legislative and judicial meaning. And, if the phrase could be regarded as ambiguous, as it can not, the fact that petitioner's construction would obviously render the statute unconstitutional would preclude its adoption. *Interstate Commerce Comm.* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14.

Petitioner asserts that the constitutional authority of the Federal Government to require a certificate of convenience and necessity for an interstate railroad, notwithstanding the fact that the effect of its construction upon interstate commerce will presumably be beneficial, offers a close analogy. (Pet. Br. 100.) On the contrary, it only illuminates the fundamental error in petitioner's contention. Obviously petitioner may regulate an interstate railroad under the commerce clause, whether the effect of the operation of the railroad be beneficial or otherwise, because the railroad is an instrumentality of interstate commerce and its regulation falls squarely within the granted authority. But constitutional authority to regulate interstate commerce and its instrumentalities affords no support for petitioner's contention that petitioner may regulate *intrastate matters* which are neither interstate commerce nor an instrumentality of interstate commerce.

**C. The Federal Power Act, properly construed, does not purport to authorize the Commission to require, or to issue, a license for a project on a non-navigable stream.**

When the Federal Water Power Act was enacted in 1920, protection of navigable capacity of navigable waters was, as it still is, provided by the Rivers and Harbors Act of March 3, 1899. Under that Act, no power project could be constructed in a navigable stream without a special Act

of Congress. The Federal Water Power Act was passed, not to protect navigable capacity, but to provide a more convenient means of obtaining federal assent and thereby encourage riparian owners to develop water power resources on navigable waters. *The Water Power Act did not prohibit anything.* This is inescapably established by its legislative history hereinafter discussed, as well as upon analysis of the language of the Act. *The prohibition against impairment of navigable capacity had been and remained in the Rivers and Harbors Act.*

The language of the Federal Water Power Act, its legislative history and its contemporaneous interpretation by the Commission itself are convincing proof that the Act did not attempt to confer, even if Congress could validly confer, upon the Federal Power Commission authority to require a federal license for projects on non-navigable streams[1] (R. 141-7). The licensing authority of the Commission (laying aside public lands and reservations not here involved) was and is limited to projects actually located in navigable streams or utilizing surplus water or water power from government dams. (Section 4(d) of Act of 1920, 4(e) of Act as amended in 1935, Pet. for Cert. 27). This section is the full grant of licensing authority to the Commission and defines the scope of its jurisdiction. Petitioner does not contend that any authority to issue or require a license for a project in a non-navigable stream can be found in Section 4(d) (or 4(e) of the Act of 1935).

Section 23 (second paragraph, either as enacted or amended), upon which petitioner has been and is compelled

[1] The Water Power Act was a merger of separate bills proposed for the leasing of water power developments on public lands and the licensing of power developments on navigable waters, which, of course, rested upon widely different constitutional bases. This undoubtedly accounts for the inclusion of many conditions inappropriate for, and in excess of constitutional authority over, navigable streams. (See Point VI; 121, *infra*.) Since this case does not involve public lands, reservations or property of the United States, that phase of the Act is excluded from this discussion.

to rely, did not grant any additional licensing authority[1] and consequently did not enlarge the scope of projects for which the Commission could require or issue a license. Manifestly Congress did not intend to authorize its agency to require a license for a project on a non-navigable stream *which its agency was not authorized to issue.* That this was the intent of Congress (i. e. that the statute applied only to project on navigable waters) is manifest from its legislative history (See Appendix A, Part III). Section 23 had quite a different purpose.

Congress knew that the navigability *vel non* of many streams and the point where navigability ceased in many other streams were undetermined and doubtful. The status of relatively few of our streams had been determined by judicial decision. Where such was not the case the consequent doubts impeded the development of many water powers with which in fact petitioner had no legal concern. In this situation, the second paragraph of Section 23 was introduced into the Federal Water Power Act to provide a procedure whereby a citizen intending and willing to construct a project in a non-navigable stream, but in doubt whether it might later be determined to be navigable and his structure therefore unlawful under the Act of 1899 could in his discretion obtain an administrative determination whether the stream is navigable and within the terms of the Act and within petitioner's jurisdiction thereunder. That is the interpretation placed upon it both in the Report of the Managers for the House Conference Committee[2] and in the Senatorial Debates (quoted in opinion of District Court, R. 145-60). The Federal Power Commission itself

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[1] Where applicable, the Section merely required and requires the declarant to apply for and receive "a license under the provisions of this Act." Licenses, as above pointed out, are authorized under the provisions of the Act only for projects in navigable waters.

[2] "This amendment seeks to prescribe how *a stream of doubtful navigability may be determined* as within the provisions of the law * * *." (H. D. 910, 66 Cong., 2nd Sess., 59 Cong. Rec. 6523.)

initially and for many years so interpreted the Act.[1] Indeed, this was the interpretation placed upon Section 23 by petitioner in the earlier case involving this project.[2]

The language of the Power Act as a whole does not support the interpretation which petitioner seeks to place on Section 23, and Congress, if it had intended to grant to the Commission authority which Congress itself had never exercised or assumed to possess, would have done so in unequivocal terms. Section 23 was inserted as an amendment and, if it were then, or now, intended to apply to non-navigable streams, Section 4(d) would have been amended, either at the time Section 23 was inserted or subsequently, to authorize the issuance of such licenses on non-navigable streams. And the filing of a declaration of intention would not have been left discretionary between 1920 and 1935. The amendment in 1935 making it mandatory is merely *clausula in terrorem* (R. 148).

It is thus plain that Section 23 of the Power Act was not intended to restrict or regulate power development on non-navigable streams but to provide for an administrative determination of navigability to remove or alleviate the doubts and fears of timid developers which had been re-

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[1] "The Federal Water Power Act did not propose to bring any new streams within the authority of the Federal Government. *It proposed rather to provide a method whereby the status of doubtful streams* could be determined * * *." (First Annual Report (1920), p. 54.) See also Fourth Annual Report, quoted by District Court, R. 147. Indeed, it was not until 1930, after this controversy arose, that a later Commission, conceding that "The law contains no express authority for the issuance of licenses for such projects on non-navigable streams", somewhat diffidently asserted that "the authority to do so seemed a *suitable inference* from the provisions of Section 23." (Tenth Annual Report, p. 7.)

[2] In its brief in *Appalachian E. P. Co.* v. *Smith, supra* (brought to the attention of the District Court in the instant case), petitioner said: "Congress desiring to assist those who are *in doubt as to navigability of a stream* provided the method under Section 23 of the Power Act for determining their liability. * * * Section 23 put the burden upon the applicant to negative the idea of *navigable waters* in his application." (pp. 44-5.)

tarding development. Many persons and corporations, public and private, were considering constructing hydroelectric developments on streams which they believed to be, but were not patently and had not actually been declared, non-navigable. Until this was determined they were unwilling to construct the project and assume the risk that the stream might later be held navigable. Thus, being doubtful as to the status of the stream, one person might intend, under the Act, to construct a project in such a stream regardless of whether the stream be found to be navigable or non-navigable. Another might intend to construct only if the stream be found to be non-navigable and if therefore no license is required. In either case the statute authorized him to invoke an administrative determination of the character of the stream.

To give Section 23 a meaning entirely consistent with the legislative history, it is sufficient merely to place proper emphasis upon the word "*intending*" and to bear in mind that at the time declaration is filed the status of the stream is uncertain. The relevant parts of Section 23 with important words italicized is as follows:

> "Any person * * * *intending* to construct a dam * * * in any stream or part thereof, [other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States] may in their discretion file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such *proposed construction*, such person * * * shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act." (Italics and brackets added.)

By reference to the italicized word "intending", and to the bracketed phrase "other than those defined herein as

navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States," it will be seen that the language not inaptly provides, as Congress intended, that a person intending to construct a development in a non-navigable stream might obtain an administrative determination confirming, if such be the case, that the waters do not fall within the category of navigable streams and that the water power development when made will not be an unlawful structure.

In any case it is obvious that the section was not intended to deal with streams known or declared to be navigable or non-navigable, but rather with streams of *doubtful navigability*. The expression "other than those defined herein as navigable waters" might, of course, be read, consistently with the legislative intent, as "other than those *declared* (or known) to be navigable waters as herein defined". It was apparently so considered by this Court in describing the provisions of the Act in *New Jersey* v. *Sargent*, 269 U. S. 328, 336. (See also Appendix A, Part III.)

Nor was this meaning of section 23 changed by the amendments of 1935. While all of these amendments were requested by the Commission and adopted by Congress on the repeated assurances of the Commission that they did not extend the authority of the Commission and were only clarifying, we are here concerned only with the amendments to the licensing section (Sec. 4(d), renumbered 4(e)) and to Section 23. Plainly none of the amendments to Section 23 is effective to extend its application to non-navigable streams. And it is equally plain, as the Commission expressly and repeatedly assured Congress, that the amendment of the grant of licensing authority (Sec. 4(d)) did not enlarge the authority of the Commission. (Hearings on Public Utility Holding Act, Part I, 450, 470, 471.)

The change in terminology employed in the grant of licensing authority from "navigable waters of the United States", as used in the Rivers & Harbors Act of 1899, to

"water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States", as used in Sec. 3 of the Federal Power Act, is merely a change to equivalent terminology and has in the past been used interchangeably in such legislation throughout the course of legislative history.[1] In fact Section 10 of the Rivers & Harbors Acts of 1890 and 1892 had used the terminology "waters in respect of which the United States has jurisdiction," and Section 10 of the Rivers & Harbors Act of 1899 shortened the terminology to "waters of the United States." Both of these expressions have always been held to include only navigable waters of the United States. *United States* v. *Rio Grande D. & I. Co., supra.* The same phrase had been used and was retained to define navigable waters in the Water Power Act. (Sec. 3(8).) Had Congress intended to give to the expression, with a meaning already well defined, some revolutionary meaning, evidence of that intent would be found in the legislative history of the Federal Power Act or in the selection of words carrying a plainly different meaning. *Marks* v. *United States,* 161 U. S. 297, 302-3; *Apfel* v. *Mellon,* 33 F. (2d) 805, 807, cert. denied, 280 U. S. 585. In any case, had Congress had the intent alleged by petitioner, it could easily, and doubtless would, have expressed its intent in plain, unmistakable language using, e. g., the term "non-navigable waters". But no such term appears in the Act.

Moreover, Section 3 of the Federal Water Power Act, before amendment and now, expressly defines navigable waters as "those *parts* of streams * * * over which Congress has jurisdiction under its authority to regulate commerce * * * ", after which there are included cumulative requirements which are obviously intended as limitations

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[1] 26 Stat. 426, Secs. 4, 7, 10; 27 Stat. 88, Sec. 3; 30 Stat. 1121, Secs. 9, 10; 34 Stat. 386, Secs. 1, 6; 36 Stat. 593, Secs. 1, 4; 41 Stat. 1063, Secs. 3, 4(d), 11, 12, 23; 49 Stat. 838, Secs. 201(8), 202(e), 210; See also Title 33 U. S. C.

upon the broad definition. It is conceded that Section 23 can not constitutionally, and does not by its language purport to, enlarge the Act beyond streams over which Congress has jurisdiction, and, by the very definition of terms contained in the Act, this phrase is synonymous with navigable waters of the United States. Consistently, therefore, with this definition in the Act, as well as with its legislative history and contemporaneous interpretation, Section 23, like all the rest of the Act, can fairly be construed as applicable only to navigable waters and its obvious purpose is to afford, by way of encouragement of timid developers of water power, a preliminary determination whether the pertinent waters are navigable and consequently whether the United States will attempt to assert any jurisdiction over them.

It will be observed that with complete consistency the first sentence added to Section 23 by the Amendments of 1935, purported (except in relation to public lands or reservations and Government dams not here involved) to make illegal only projects constructed in "*navigable waters of the United States*" where constructed without a license from the Power Commission, if built since June 10, 1920, or where built without other federal authorization, if constructed prior to June 10, 1920.[1] This plainly negatives petitioner's contention that the Act applies to other than navigable streams. This was a Congressional reaffirmation (no doubt dictated by a recognition of the limits of federal constitutional authority in the same way that a similar distinction was drawn in Sections 9 and 10 of the Rivers & Harbors Act of March 3, 1899) of the legislative intent, so abundantly evidenced by legislative history, that the Federal Power Act applies only to navigable waters of the United States.

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[1] As Senator Wheeler pointed out in submitting the Report of the Committee on Interstate Commerce, this did not add anything to the prohibition in the Rivers and Harbors Act of 1899 (Senate Report No. 621, 74th Cong., 1st Sess., with reference to Section 210).

Likewise, it is significant that the sentence added in 1935 to Section 23 prohibited construction, *operation or maintenance,* whereas the only thing to be investigated upon the filing of a Declaration of Intention was and is the effect of the "proposed *construction.*" This clearly negatives any claim that Section 23 applies to non-navigable waters. It is plain that construction alone could affect navigation or even "an interest of interstate commerce" only if it were in a navigable stream. Otherwise any conceivable effect of the proposed project on interstate commerce could arise only in the method of operation. And the Act throughout provides this controlling distinction between the operation of a project and the mere construction of a project. (See 4(d), 10(c), 13, 21.)

The fact that any other interpretation would plainly make the Act unconstitutional (See Points V and VI) and would mark a revolutionary change in congressional attitude, supports, and indeed requires, this interpretation, because it is fundamental that a statute should be construed not merely so as to avoid unconstitutionality but so as to avoid raising grave or serious questions as to its constitutionality. *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14; *Holy Trinity Church* v. *United States,* 143 U. S. 457.

For a fuller review of legislative history and proper interpretation of the Act, see Appendix A, Part III.

**D. Assuming *arguendo* that the Act could be construed to require SOME license for respondent's project, it should be construed as requiring only a minor-part license, or its equivalent, embracing only conditions regulatory of flow for the protection of navigation.**

If the absence of any licensing authority on non-navigable streams, and if the other considerations establishing that the Act does not extend to non-navigable streams, be disregarded, then Section 23 would merely authorize the issu-

ance of a license "under the provisions of the Act." While a standard form or major license under the Act must contain all the conditions embodied in subsections (a) to (h) of Section 10 of the Act, Section 10(i) authorizes the Commission to waive all conditions except the 50 year term "in issuing a license for a minor part of a project." The legislative history shows that, laying aside projects on Indian Reservations not here involved, a minor-part license may be issued whenever the interest of the United States, of whatever character, is only minor in relation to the project as a whole (R. 2771-3; 2785-6).

Although the evidence shows and the lower courts found that neither the intended operation nor any conceivable operation would impair navigable capacity, it is obvious that the only conceivable interest of the United States is in the manner in which the water is passed through the power house and over the dam from the standpoint of navigation and that, to accomplish such a purpose, only the control of the gates of the power house and dam would be required or useful. Manifestly, this is only a minor part of the project, whether viewed as a physical structure or otherwise.

On September 22, 1930, the Attorney General of the United States, in an opinion dealing with respondent's project, said:

> "the only interest which the United States has to protect, and for which it *may* be justified in issuing a license, is a *very minor part of the complete project, viz., the manner in which the flow of the stream below the dam is affected by* the operation of the water power" (Ex. 532, R. 2786).

And the Attorney General, in the same opinion, after advising the Federal Power Commission that it was authorized to issue a minor part license for respondent's project with conditions so limited, stated further that such an interpretation of the Act was *"necessary in order to avoid serious questions regarding the constitutionality of the Act."*

Both before and after the hearing on the declaration of intention on respondent's project, the Federal Power Commission granted such minor-part licenses where the interest of the United States was minor in comparison with the complete project, *even though the project was located in navigable waters or on public lands.*[1] Obviously, such an interpretation of the statute would satisfy every possible federal interest and, although we think the petitioner is without constitutional authority to require any license, such a construction would at least minimize the extent of the unconstitutional invasion of the rights of the respondent and of the State. To that extent, it would give some effect to the rule that a statute should be construed "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *I. C. C.* v. *Oregon-Washington R. & N. Co., supra.* On the other hand, petitioner's attempt to impose upon this project on a non-navigable stream the conditions of a major license (many of which would be unconstitutional even as applied to a project on a navigable river) involves the grossest invasion of the rights of the State and confiscation of the property of respondent.

**E. Assuming *arguendo* that the Act could be construed to require a minor-part license for respondent's project, petitioner's conduct would bar it from relief.**

For the reasons hereinbefore reviewed, it is apparent that, under any conceivable interpretation of the statute and under any conceivable view of petitioner's constitutional authority, petitioner could at most require for re-

[1] For minor part licenses for projects involving navigable waters see 5th Annual Report 111-12; 10th Annual Report 82, 83, and for a project utilizing a portion of a federal navigation improvement, 16th Annual Report 53; for other illustrations of minor part licenses granted by Commission, even involving the use of public lands, see 7th Annual Report 231, 232; 11th Annual Report 193, 195; 12th Annual Report 238, 240; 18th Annual Report 57.

spondent's project a license with conditions limited to the regulation of the flow through the power house and over the dam for the alleged protection of navigation. Respondent, while denying any jurisdiction of petitioner in the premises, steadfastly, over a period extending from 1928 to the time when the instant suit was instituted in 1935, offered to accept a minor-part license containing such conditions. Specifically it offered to accept the identical conditions regulatory of flow for the alleged protection of navigation which are incorporated in the license which petitioner asks the courts to require respondent to accept. See pp. 11-13, *supra*. Petitioner, on the other hand, steadfastly refused to issue a license unless respondent would agree to accept a major license with its numerous unconstitutional conditions and restrictions, discussed in Point VI, *infra*.

Petitioner now asks a court of equity to prevent the respondent from making any use of its property and to render its property substantially valueless unless respondent will agree to the surrender of its constitutional rights. It is plain that the relief sought by petitioner would constitute a taking of respondent's property without due process of law in contravention of the Fifth Amendment. *Monongahela Navigation Co.* v. *United States, supra; United States* v. *Cress, supra*. To grant relief under such circumstances would require a court of equity to aid in the accomplishment of an unlawful and unconstitutional act. When the United States comes into a court of equity, all the rules established for the administration of justice between individuals are applicable to its claims and rights.[1] The constitutional rights of the individual may not be thus destroyed. *Frost Trucking Co.* v. *Railroad Commission,*

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[1] *Pan American P. & T. Co.* v. *United States*, 273 U. S. 456, 505; *United States* v. *The Thekla*, 266 U. S. 328; *Kandle* v. *United States*, 4 F. (2d) 183 (C. C. A. 3rd); *United States* v. *Midway Northern Oil Co.*, 232 Fed. 619; *United States* v. *Devereux*, 90 Fed. 182 (C. C. A. 4th); *State of Iowa* v. *Carr*, 191 Fed. 257 (C. C. A. 8th).

271 U. S. 583, 593. And surely a court of equity will not lend its aid to such a scheme.

On the other hand, as the Trial Court pointed out, if, contrary to the situation as it now exists, any new situation should ever arise in which the operation of respondent's project created or threatened to create an impairment of navigable capacity, the authority of the United States to compel removal of the structure or modification of the method of operation would be full and complete under the Rivers and Harbors Act of March 3, 1899. But, as the court below found, such a situation does not now exist.

## POINT V.

**Petitioner has no constitutional authority to require a license for a project located in non-navigable waters and *a fortiori* for respondent's project which will not impair navigable capacity.**

Since, as we have shown, respondent's project is not located in navigable waters and its operation will not impair the navigable capacity of any navigable waters or affect the interests of interstate commerce within the meaning of the Power Act, that Act is plainly inapplicable; and no constitutional question is presented for decision. See Point IV *supra*.

However, if, as petitioner urges, that Act were applied to respondent's project, it would be to that extent plainly unconstitutional for the following reasons:

*First:* Petitioner has no constitutional authority to require a license for a project on a non-navigable stream and *a fortiori* for respondent's project which will not impair navigable capacity.

*Second:* Even for projects in navigable waters or in non-navigable waters and impairing navigable

capacity, and *a fortiori* for respondent's project located on a non-navigable stream and not impairing navigable capacity, many of the license conditions are:

(a) in excess of any constitutional authority of petitioner,

(b) a clear invasion of the rights reserved to the states and their peoples under the ninth and tenth amendments, and

(c) a taking of property without due process of law—both as a taking without constitutional authority and as a taking without just compensation.

The first proposition is discussed in this section; and the second proposition is discussed in Point VI *infra*.

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The precise constitutional authority which Congress invoked in the Federal Water Power Act was its implied authority over navigable waters; and, as hereinafter appears, it is that aspect of the commerce clause upon which petitioner almost wholly relies. However, since petitioner also invokes some other aspects of the commerce clause, it will contribute to clarity, and avoid what in our view is confusion in petitioner's brief, to consider separately (1) whether constitutional authority to require any license for respondent's project exists under such implied authority in relation to navigable waters, and (2) if not, whether it exists under any other aspect of the commerce clause. For these reasons, we shall examine these questions separately in the order stated.

**A. Petitioner has no constitutional authority to require a license for respondent's project under its implied authority in relation to navigable waters.**

This proposition is, we think, demonstrated by a brief examination of the nature of the respective rights of the

United States, the States and riparian owners in navigable and non-navigable waters.

1. *Even in navigable waters, the United States has no title or property right in the waters or the beds of the streams, and its powers are limited to control of such waters for purposes of navigation.*

Contrary to petitioner's assertion (Pet. Br. 114-5), the water power resources of streams, either navigable or non-navigable, are not the "heritage" of the Federal Government but instead are the property of the several states except in so far as the States may have granted them to their citizens. The United States has no title or property right in navigable streams, their waters, their water power or the lands over which they flow; and the property rights of riparian owners, on both navigable and non-navigable streams, are created by and flow exclusively from State sovereignty. *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 63; *United States* v. *Cress*, 243 U. S. 316; *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10; *Shively* v. *Bowlby*, 152 U. S. 1. The right or authority of the United States in relation to navigable waters is limited to the control thereof for the purposes of navigation. *Port of Seattle* v. *Oregon & W. R. R. Co., supra*, 63; *United States* v. *Oregon*, 295 U. S. 1, 14; *Kansas* v. *Colorado*, 206 U. S. 46. Any legislation ostensibly for the control of navigable waters which has no real or substantial relation to their control for purposes of navigation is unconstitutional and void. *United States* v. *River Rouge Co.*, 269 U. S. 411, 419; *Wisconsin* v. *Illinois*, 278 U. S. 367, 415.

Contrary to petitioner's apparent claim (Pet. Br. 124, 130), the authority of the United States to control navigable waters, solely for purposes of navigation, does not include the old common law right to have waters run *currere solebat*. That was a property right of riparian owners which was and is subject to regulation and change by the States, the

source of all property rights, in order to turn their resources to a more perfect use. So long as the States do not substantially impair navigable capacity of federal navigable waters, the States may authorize or command such alteration in natural flow of their streams as they deem in their best interests. *Kansas* v. *Colorado*, 206 U. S. 46, 94; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 703; *Head* v. *Amoskeag Co.*, 113 U. S. 9; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Otis Co.* v. *Ludlow Co.*, 201 U. S. 140, 152; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670. It is solely a matter of State choice. *California Power Co.* v. *Cement Co.*, 295 U. S. 142, 163-4.

Contrary to petitioner's assertions (Pet. Br. 118, 119, 130), the United States has no authority under the commerce clause or otherwise to construct or acquire a power project or to develop the waterpower resources of either navigable or non-navigable streams; and it may not constitutionally create water power other than that which is incidentally and necessarily produced by works constructed for some constitutional purpose and those works must be reasonably appropriate for, and have a real and substantial relation to, the performance of the constitutional function which in the premises is limited to the creation or improvement of navigability. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254, 273; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 613; *Missouri* v. *Union E. L. & P. Co.*, 42 F. (2d) 692, 695. This limitation upon petitioner's constitutional authority is unaffected by considerations of "economic feasibility" and can not be escaped by designating a statutory scheme as a "multiple purpose project" (Pet. Br. 119). Petitioner may not develop water power merely for profit, or as a primary purpose, or as a separate and independent objective, merely because it concurrently authorizes some constitutional structure which does not necessarily or incidentally create the water power.

2. *While the right of a riparian owner on a navigable stream to develop water power is subject to the servitude of navigation, the right of a riparian owner on a non-navigable stream is subject to no servitude in favor of navigation and may not be taken or restricted (as long as no nuisance is created) without compensation.*

The right to use the flow of a stream for the development of water power is a recognized property right and a normal incident of riparian ownership. Even on a navigable stream, the underlying right to develop water power is in the state or riparian owner. *Pike Rapids Power Co.* v. *Railroad,* 99 F. (2d) 902, 908, cert. denied 305 U. S. 660; and its exercise is restricted only by such limitations as may arise out of the necessity to refrain from interfering with the use or improvement of the stream *in its natural location* for navigation purposes. *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53; *United States* v. *Cress,* 243 U. S. 316; Opinion of Chief Justice Taft as Secretary of War, Report of Sub-Committee on Dams and Water Power, House Committee on Interstate Commerce, 60th Congress, February 25, 1909.

The servitude in favor of navigation, to which riparian lands on navigable streams are subject, is a *natural servitude* implicit in the location of the property and *limited to the stream in its natural state. United States* v. *Cress,* 243 U. S. 316, 321, 325; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *United States* v. *Lynah,* 188 U. S. 445; *Packer* v. *Bird,* 137 U. S. 661, 667; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 698; *Leovy* v. *United States,* 177 U. S. 621, 631. Whenever that servitude is exceeded by any action of the federal government in the improvement of a navigable water or the creation of an artificial federal waterway, it takes property for which it must make compensation. *United States* v. *Cress, supra,* 326; *United States* v. *Lynah, supra; Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *River Rouge Co.,* 269 U. S. 411, 419; *Wisconsin* v. *Illinois,* 278 U. S. 367, 415, 418.

On the other hand, the property rights of riparian owners on non-navigable streams are subject to no servitude in favor of navigation. When and if such rights are restricted by the federal government for the improvement of navigation or the creation of navigability, there is a taking of property for which compensation must be made. *United States* v. *Cress, supra,* 319-321; Fourth Annual Rep. Fed. Power Commission: 1924, p. 181, 185, Opinion of Chief Counsel. Of course, no one has a right to create or maintain a nuisance. However, that limitation upon the use of property is not a servitude but merely results from the inherent limitation upon all property rights. A right inseparably connected with the ownership of the land through which a non-navigable stream flows is the right to create water power by damming the stream and using the power; and this property right can not be taken from the riparian owner except for public purposes and then only upon compensation. *United States* v. *Cress, supra,* 321-2, 329-330; *Ford Hydro-Electric Co.* v. *Neely,* 13 F. (2d) 361, 362, cert. den. 273 U. S. 723; *Union Electric Co.* v. *Snyder Co.,* 65 F. (2d) 297, 304; *Carpenter* v. *Gold,* 88 Va. 551; *Rankin* v. *Harrisonburg,* 104 Va. 524; *Lynchburg* v. *Mitchell,* 114 Va. 229; *Fulton Power Co.* v. *New York,* 200 N. Y. 400; *Kalama etc. Co.* v. *Kalama Driving Co.,* 48 Wash. 612, 94 Pac. 649; *People ex rel. Niagara Falls Power Co.* v. *Smith,* 70 App. Div. (N. Y.) 543, 546. The extent to which riparian owners may vary the natural flow for the development of water power resources depends upon the law of the particular state. (See pp. 109-110, *supra*). It is unquestioned that the sum of the proprietary rights granted respondent by the State of Virginia constitutes a full and complete property right to construct and operate respondent's project under the laws of that State (R. 154).

This is not to say that the United States has no constitutional authority to utilize a non-navigable stream in the creation of an artificial interstate waterway, but in so doing it must make compensation for property taken. In

such cases it is not exercising its power of mere "regulation" of navigable waters but is appropriating for a public purpose private property for which it must make compensation under the Fifth Amendment. (See also pp. 111-12, *supra.*) There is a marked distinction between the power of the Federal Government *to regulate without compensation* and the power *to make public improvements upon compensation made for property taken.* We here deal with the limits of the power of the United States *to regulate without compensation.*

3. *Any constitutional authority of the United States is no different or greater in relation to non-navigable waters than in relation to land; and consequently, it has no constitutional authority to make illegal* **per se** *the erection or maintenance of structures without a federal license merely because they are located in a non-navigable stream.*

The constitutional authority of the United States in the premises rests solely upon its jurisdiction over navigable waters. This results in a marked distinction between its constitutional authority over structures in a navigable stream and its *incidental* authority to prevent any substantial impairment of their navigable capacity by any act, wherever performed, beyond the limits of navigable waters.

The constitutional authority of the Federal Government over navigable streams is merely implied from the authority to regulate interstate commerce. *Gilman* v. *Philadelphia,* 3 Wall. 713; *Gibbons* v. *Ogden,* 9 Wheat. 1. It is merely "an incidental power". *Leovy* v. *United States, supra,* 632. This implied authority over interstate navigable streams arises solely from the fact that they are *natural* highways of interstate commerce. It does not derive from the fact that *they are water* but from the fact that they are natural instrumentalities of interstate commerce. The result is that the Federal Government may regulate, and therefore require a license for, the placing of structures in such highways so

long as such regulation has a real and substantial relation to the protection of navigation or navigable capacity and so long as it does not attempt to make the exercise of the licensing power the vehicle of extending federal authority into a field closed to the Federal Government by the Constitution. *United States* v. *Butler*, 297 U. S. 1; *Linder* v. *United States*, 268 U. S. 5, 17; *The Employers' Liability Cases*, 207 U. S. 463, 502; *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583. Within those limitations, it may make the erection or maintenance of a structure in a navigable stream without a federal license *ipso facto* unlawful.[1] *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

On the other hand, a non-navigable stream is not a highway of interstate commerce, and riparian lands on such streams are subject to no servitude in favor of navigation. Plainly the Congress has no peculiar constitutional authority over acts merely because they occur in non-navigable streams. It has no greater constitutional authority in relation to structures in these streams than in relation to structures on dry land. Therefore it may not make the erection or maintenance of structures in those streams without a federal license *ipso facto* unlawful and consequently does not have authority to require a permit or license for such structures merely because they are located in non-navigable streams. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *United States* v.

[1] It may, however, be noted that there is a wide distinction between the authority of the Federal Government to abate a structure in navigable waters as an obstruction to navigation and the authority of the Federal Government to appropriate such a structure to a public constitutional use. It may abate such an obstruction without compensation, for that is merely an enforcement of the servitude of riparian property in favor of navigation. However, it may not appropriate the structure to the public use without making compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. In the *Chandler-Dunbar* case the Federal Government *paid for the property taken* and that which it required to be abated as an obstruction to navigation and, for which it made no compensation, it did not seek to appropriate to the public use.

*Doughton*, 62 F. (2d) 936 (C. C. A. 4th). Of course, the United States has authority to protect navigable capacity from impairment by any act wherever performed, but whenever the act is performed outside of navigable waters (whether in non-navigable streams or on dry land), any right to prevent it depends upon proof that it does or will substantially impair the navigable capacity of navigable waters, and the constitutional limit of federal authority in such cases is to restrain the erection or method of operation of the structure to the extent, and only to the extent, necessary to remove or prevent an actual or threatened substantial impairment of the navigable capacity of the navigable stream.

The existence of any federal constitutional authority rests not upon what is done outside the navigable stream; instead it rests upon and is circumscribed by the existence and extent of the actual or threatened adverse effect in the navigable stream. The existence of such an adverse effect in the navigable stream is the sole and indispensable factual basis of any possible federal authority and the extent of any such authority is measured by what is necessary to remove or prevent a substantial impairment of navigable capacity, for beyond that no factual basis for the exercise of constitutional authority exists. In short, the indispensable factual bases of federal authority in the premises are: (1) a navigable water of the United States; (2) actual or threatened substantial impairment of its navigable capacity; and (3) proof that such actual and threatened impairment is caused by the construction or operation of a structure in a non-navigable stream or elsewhere outside the navigable waters. Manifestly, the United States is without constitutional authority to make structures in non-navigable streams illegal *per se* without a federal license and consequently may not impose a general federal licensing system upon such structures.[1]

[1] Obviously, if petitioner, without establishing these facts, has no authority to restrain any act of respondent, *a fortiori* it has no

(*Footnote continued on next page*)

Thus, in *United States v. Rio Grande Irrigation Co., supra,* the United States sought to enjoin the intended acts of the defendant (the construction of large irrigation works on a non-navigable reach of the Rio Grande River, with permanent diversion of a substantial part of its flow) upon the ground that the project was "not affirmatively authorized by law" as allegedly required by the Rivers and Harbors Acts of 1890 (26 Stat. 454) and 1892 (27 Stat. 110). There was no claim that the project had been "affirmatively authorized by law". This Court held that the project was not for that reason *ipso facto* unlawful and that the United States could enjoin the intended acts of the defendant only upon proof that they would substantially impair the navigable capacity of navigable waters "where navigability is a recognized fact" (loc. cit. 709) and *then only to the extent that such intended acts would thus substantially diminish navigable capacity elsewhere.*[1] (*loc. cit.* 710).

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authority to impose the requirement of a federal license for the doing of an act which it has no power to prohibit. As stated in 37 Corpus Juris 166-7:

> "The term 'license' is not involved in uncertainty or doubt; in its general and popular sense, as used with reference to occupations and privileges, it means a right or permission granted by some competent authority to carry on a business or do an act which, without such license, would be illegal. It is a formal or official permit or permission to carry on some business or do some act which, without the license, would be unlawful, the words 'license' and 'permit' often being used synonymously."

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[1] The situation of the United States in relation to structures outside navigable waters is in principle similar to that of the State of Georgia in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. There Georgia had no jurisdiction over what was done in the State of Tennessee. Its rights rested solely upon the effect produced in the State of Georgia and were limited to restraining the acts in Tennessee to the extent necessary to prevent substantial adverse effect in the State of Georgia.

4. *On the facts of this case, petitioner has no constitutional authority to require a license for respondent's project under its implied authority in relation to navigable waters.*

Since respondent's project is not located in a navigable stream and its operation will not impair navigable capacity, it necessarily follows that petitioner has no constitutional authority to require a license for, or to restrain operation of, the project under petitioner's implied authority in relation to navigable waters. All of petitioner's arguments in support of a contrary conclusion are untenable either in fact or in law, or both.

(1) Petitioner's argument that it has constitutional authority to construct respondent's project, and that, therefore, it may license a private corporation to construct the project *upon whatever terms petitioner may prescribe* (Pet. Br., 120-1), is both inapposite and unsound.

*First:* Petitioner may not construct a project, either directly or through an agent, for which it has no constitutional authority—such as respondent's project, which is simply a power plant on a non-navigable stream (see p. 110, *supra*).

*Second:* The wide difference between the authority to employ a *voluntary* agent to construct a *constitutional* structure and the asserted authority to *impress or coerce* a citizen as an unwilling agent to construct a federal work *"upon such terms and conditions" as petitioner may prescribe,* hardly requires elaboration. In short, petitioner asserts authority to prohibit a citizen from using his property for the only purpose for which it is useful or valuable to him unless the citizen will consent to become a federal agent upon such terms and conditions as petitioner prescribes. But on analysis, petitioner's argument is even broader and more shocking. It comes down to a proposition that because petitioner has authority to condemn any citi-

zen's land for a constitutional purpose, petitioner may, without condemnation (and indeed without any Congressional authorization to acquire the citizen's land for any purpose), prohibit a citizen from using his land for any purpose without a federal license—so conditioned that the citizen must submit to burdensome regulation by petitioner and eventually turn over his land to petitioner upon such terms as petitioner may prescribe.

There is not an acre of land or a city lot in the United States which could not conceivably be acquired for a post road, post office, arsenal, fort or other federal work. By parity of reasoning, petitioner may prohibit every landowner in the United States from building anything upon his property without a federal license because forsooth a federal structure could conceivably be built upon the land.

(2) Petitioner asserts that it has constitutional authority to prohibit the construction of respondent's project because *its incidental* effect, *if any*, upon navigation or flood control will be beneficial. (Pet. Br. 123-4.) Laying to one side the fact that any benefit to navigation or flood control is purely incidental, fortuitous and unsubstantial (see pp. 87-9, *supra*), the contention is plainly unsound. Neither the construction nor operation of respondent's project is interstate commerce. (See p. 119, *infra*.) Petitioner has no constitutional authority under the commerce clause to regulate intrastate matters except when, and then only to the extent that, such regulations have a real and substantial relation to, and are necessary for, the protection of interstate commerce from *substantial injury* produced by such intrastate acts. *Schechter Corp.* v. *United States*, 295 U. S. 495, 544; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 31-2, 36-7; *Carter* v. *Carter Coal Co.*, dissenting opinion Cardozo, J., 298 U. S. 238, 327-8; *United States* v. *Rio Grande D & I Co.*, *supra*. Almost every act of every citizen probably has some insubstantial and remote effect upon interstate commerce. We are now told that, if that is so, whether that incidental

effect be detrimental or beneficial, every such act of a citizen falls within the regulatory authority of petitioner under the commerce clause. Not only is this contention in the teeth of the decisions of this Court but it would plainly destroy our dual system of government.

Nor does petitioner's implied contention that by a license it could compel respondent to operate its project, at the expense of itself and its property rights, so as to increase the incidental benefits to navigation and flood control in relation to navigation stand in any better stead. Petitioner has no constitutional authority to require respondent to make such federal improvements without compensation. If petitioner had such authority, it could as well require respondent to utilize its property *solely* for flood control or for the construction of an artificial navigable waterway, all without compensation. The difference would be one of degree and not of constitutional authority.

**B. Petitioner has no constitutional authority to require a license for respondent's project under any other aspect of the commerce clause.**

Neither the construction nor operation of respondent's project is interstate commerce. *Utah Power Co.* v. *Pfost*, 286 U. S. 165, 179-82; *South Carolina Power Co.* v. *Tax Commission*, 52 F. (2d) 515, 524, *affirmed* 286 U. S. 525. Petitioner has no constitutional authority to prohibit the operation of manufacturing plants or of farms merely because some part of the goods produced may ultimately move in interstate commerce. Petitioner advances only two arguments in support of its contention that it has authority to require a license under the commerce clause for reasons unrelated to its implied authority over navigable waters. Both are plainly without substance.

(1) Petitioner asserts, without citation of authority, that it may forbid the construction of respondent's project without a federal license merely because some part of the

electricity which it generates will move in interstate commerce. (Pet. Br. 125.) The distinction between the regulation of goods *after they commence to move in interstate commerce* and the asserted authority *to prohibit construction of manufacturing plants* without a federal license is obvious and fatal to petitioner's contention. *Utah Power Co.* v. *Pfost, supra; Kidd* v. *Pearson,* 128 U. S. 1; *Carter* v. *Carter Coal Co., supra; Schechter Corp.* v. *United States, supra.* And, in the very Part II of the Power Act to which petitioner refers, Congress has expressly disclaimed any intention to assert such authority under the Power Act (Tit. 16 U. S. C. 824(b)). There is, of course, no analogy to the federal authority to regulate an *instrumentality* of interstate commerce; and indeed even that authority extends only to the facilities upon which the movement of goods in interstate commerce depends.

2. Finally, petitioner asserts, without citation of authority, that it may prohibit construction of respondent's project because the natural flow of all waters from the spring houses to the sea is interstate commerce. (Pet. Br. 126-7.) Manifestly, the natural flow of water is not commerce at all. The recognition of such a theory would destroy the constitutional distinction between navigable and non-navigable waters and between federal and state waters, and would transfer to the Federal Government control over, and virtual ownership of, practically all of the waters of the States.

## POINT VI.

**Assuming *arguendo* that petitioner had authority to require some license for respondent's project, it could not constitutionally impose those conditions of the tendered license which are unrelated to the protection of navigation.**

We have already shown that any authority to require a license, if it exists, must rest upon petitioner's implied authority in relation to navigable waters (see pp. 107-20, *supra*).[1] Consequently, we now examine the question whether, assuming *arguendo* petitioner's authority to require *some* license, the license conditions could be sustained under petitioner's implied authority in relation to navigable waters.

### A. Many of the license conditions would be unconstitutional as applied to projects located in navigable waters or in non-navigable waters and impairing navigable capacity; and, *a fortfori*, they are unconstitutional if applied to respondent's project located in non-navigable waters and not impairing navigable capacity.

We have already seen that even on a navigable stream the Federal Government may not impose regulations which do not have a real and substantial relation to the protection of navigation or navigable capacity. *A fortiori* it can not impose such conditions or regulations upon non-navigable streams, where the sole source of its constitutional authority, if any, must depend upon the actual or threatened impairment of navigable capacity in navigable waters by reason of acts done on non-navigable streams.

[1] In so far as petitioner seeks to defend the license conditions upon any other aspect of the commerce power, they are discussed at pages 128-38 *infra*.

The constitutional authority of the petitioner in so far as it exists over navigable streams or any other subject-matter, is limited by the principles: (1) that the exercise of an admitted power may not be made the vehicle of exercising authority not delegated to the Federal Government or forbidden to it; (2) that, conversely, the attainment of a prohibited end may not be accomplished under the pretext of exerting powers which have been granted to the United States. *McCulloch* v. *Maryland*, 4 Wheat. 416, 421, 423; *Linder* v. *United States*, 268 U. S. 5, 17;[1] (3) that, regardless of amount of compensation, petitioner may not take lands of a citizen for an unconstitutional purpose; and (4) that the Federal Government, even in the process of making a public improvement within its constitutional authority, may not take property without compensation in violation of the Fifth Amendment. *United States* v. *Cress*, 243 U. S. 316, 319; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336.

Briefly stated, the tests which must be applied to determine whether the statute (Power Act), as construed by petitioner, or the terms of the tendered license (which petitioner asks the court to require respondent to accept) are within the constitutional authority of the petitioner are:

> (1) Does the license impose regulations upon respondent which do not have a real and substantial relation to the prevention of any substantial impairment of the navigable capacity of navigable waters of the United States?
>
> (2) Does the license impose regulations upon respondent which involve an exercise of local powers of government, such as the police power or any other power not delegated to the Federal Government but reserved to the States and the people and expressly

[1] As this Court has said, "to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed". *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291.

forbidden to the Federal Government by the Ninth and Tenth Amendments?

(3) Does the license impose regulations upon respondent which, for the purpose of creating navigability or of improving navigability elsewhere, restrict the use of respondent's property, with the result of appropriating respondent's property for a public improvement without compensation, or which require respondent to surrender its property to petitioner for an unconstitutional use—all in violation of the Fifth Amendment?

The license, in conformity with the mandatory terms of the Act, stipulates that respondent shall be subject not only to all the terms and conditions of the Act, but also to such rules and regulations as the Commission may prescribe (Ex. 131, R. 2663, 2665, 768). Many of the terms in the tendered license would be unconstitutional for a project on a navigable stream, but here we are concerned only with a project on a non-navigable stream. In the interests of brevity we do not consider these conditions in detail but confine our discussion to illustrative conditions which, in our opinion, plainly establish that the license is beyond the constitutional authority of petitioner to impose.

Section 10(a) (16 U. S. C. 803(a)) requires that a licensed project shall "be best adapted to a comprehensive plan (1) for *improving or developing a water or waterways* for the use * * * of interstate or foreign commerce, (2) for the improvement and utilization of water power development, and (3) for other beneficial public uses, including recreational purposes". Condition 1 requires a licensee to devote or agree to devote his property to a public use without compensation. Condition 2 attempts to usurp authority reserved to the States over the development of water power on non-navigable streams. Condition 3 attempts to assert federal authority in displacement of the ordinary police powers of the state over its non-navigable waters. The regulation

of the waters of a stream, *even a navigable stream*, for uses other than navigation, falls exclusively within state sovereignty. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349; *Holyoke Co.* v. *Lyman*, 15 Wall. 500, see also cases p. 110, *supra*. So long as there is no impairment of navigable capacity of federal navigable waters, it is no concern of the Federal Government whether the policy of Virginia for the development of its non-navigable streams—or its navigable streams, for that matter—meets the approval of any federal bureau.

Section 10(c) contains numerous conditions relating to the maintenance, renewal, replacement and operation of the power plant, the establishment and maintenance of depreciation reserves for such purposes and also for purposes of navigation and requires a licensee to

> "conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property".

Manifestly, none of the conditions has any relation to the protection of navigable capacity. Some of them require a licensee to devote its property to public use without compensation and they further attempt to transfer to petitioner the full police power of the State.

Section 10(d) requires the establishment of "amortization reserves" out of earnings "in excess of a specified reasonable rate" to be applied from time to time in reduction of the net investment of the licensee. Manifestly these conditions have no relation to the prevention of impairment of navigable capacity of navigable waters, and are a plain invasion of the reserved rights of the State.

Section 10(e) requires the licensee to pay annual charges fixed by the Commission "for the expropriation to the Government of excessive profits" and provides for the establishment of a federal policy of stimulating public ownership of power developments on navigable streams. Manifestly the expropriation "of excessive profits" according

to the ideas of the petitioner has no relation to the protection of navigable waters. Likewise the petitioner has no right or authority to impose directly or indirectly upon a State a system of either public or private development of water power, or to exclude the citizens of a State from the development of its water power resources under State law.

Section 10(g) purports to empower the Commission to regulate projects in any manner whatsoever so long as not inconsistent with the Act. It thus purports to appropriate all the powers of government reserved to the States. Typical of the conditions which might be imposed under this broad authority, if it could be upheld, are Articles 21 and 22 of the tendered license (Ex. 131, R. 2663, 768) which prohibit the lease or sale of the project or any part thereof without the approval of the Commission.

**The "capture clause" (Section 14).** Section 14, which purports to give petitioner the right to "take over" or capture[1] a project at the end of the license period, is printed in petitioner's brief 154-6. This clause is plainly in excess of any constitutional authority of petitioner, an invasion of the reserved right of the States and their people and a clear taking of private property without due process of law—both as a taking without constitutional authority and as a taking without just compensation as required by the Fifth Amendment.

*First:* It requires respondent to agree that petitioner shall have the right *"to take over and thereafter maintain and operate"* respondent's project. Respondent's project is simply a power project which petitioner would have no constitutional authority to take over and operate whether on a navigable or a non-navigable stream. The taking of a citizen's property for a purpose for which the "taking" government has no constitutional authority to condemn, is a gross invasion of the rights of the citizen, no matter what compensation is paid. It is also a gross invasion of the

[1] As to gross error of describing this alleged right as "recapture", see footnote p. 3, *supra*.

rights of the states and their peoples. Plainly, if petitioner may prohibit the use of private property unless the owner will surrender that property, immediately or ultimately, to petitioner for purposes for which petitioner has no authority to condemn or acquire the property, petitioner may destroy the authority of the States to regulate the development of their own resources and the right of their peoples to utilize such resources under State law in conformity with State policy.

*Second:* The "capture" clause is plainly confiscatory. It requires a licensee to agree that petitioner may "take over" the project upon payment to the licensee of its "net investment" in the project, or its fair value at the time of taking, *whichever is the less.* The Act itself, with a realistic bow to the language of the street, carefully distinguishes between such "taking over" the property of a licensee and its acquisition by condemnation "upon payment of just compensation" (Sec. 14). Upon such taking over or capture "net investment" is subject to diminution by deduction of amortization reserves, unappropriated surplus, current depreciation accounts and sinking funds and by the expropriation of excess profits, as defined by the Federal Power Commission, and excludes any allowance for going value (Sec. 14, Sec. 3(13)). Both the "net investment" and the "fair value" prescribed by the Act not only exclude "going value", but also any value for water rights or lands in *excess* of "the *actual* reasonable cost thereof at the time of acquisition" (no matter when acquired, which may have been years before the issuance of the license) so that petitioner will "take" any increase in the value of lands or water rights and the licensee will bear the loss of any decrease in their value.

The confiscatory character of such a contractual obligation would be sufficiently apparent under stable monetary and economic conditions. But under present conditions with the potentiality of severe inflation constituting a definite threat, it is obvious that under such a contract there is a

real possibility that the petitioner might "take over" respondent's property upon paying merely the number of dollars (greatly reduced in purchasing power) which had not been eliminated from the original investment by the statutory definitions of "net investment" and "fair value" and thereby might acquire such property for an insignificant fraction of its reproduction value, of its real worth or of the original investment.

If the Federal Government had the authority to acquire and operate a hydro-electric plant on a non-navigable stream, it could condemn such a plant *at any time upon payment of just compensation.* There can be no reason for attempting to extort a contract to sell such a property to the petitioner unless it is that petitioner (as is the fact) is without constitutional authority to condemn the property or that petitioner (as is also the fact) seeks to acquire the property for less than just compensation.

Assuming the right of "capture" (which respondent denies), petitioner asserts that, if it has the power to capture, it can prescribe all of the terms of the capture. The Federal Government has the right to condemn property for a public, constitutional use but it can not prescribe the terms of condemnation. Under the Constitution it must pay just compensation, to be determined by the courts.

Plainly, as petitioner now concedes (Pet. Br. 128) none of the foregoing illustrative conditions, nor various similar conditions prescribed by the Act and included in the tendered license, has any real or substantial relation to the protection of navigable waters and consequently may not be sustained under petitioner's implied authority in relation to such waters. Since, as we have previously shown, any authority of petitioner to require any license must rest upon this implied authority, it follows that such conditions may not be sustained under any other aspect of the commerce clause and this further appears from our subsequent examination of the arguments advanced by petitioner in defense of these license conditions.

It is thus plain that, even if petitioner had the authority, as it has not, to require some license for respondent's project, both the statute, as construed by petitioner, and the tendered license would be unconstitutional and void.

**B. Petitioner's arguments in defense of the license conditions are severally untenable or inapposite.**

We now examine seriatim petitioner's arguments in defense of these license conditions.

1. *Petitioner's argument that it has authority to impose license regulations unrelated to its constitutional authority.* (Pet. Br. 128-131) Petitioner does not attempt to show that these license conditions are related to, or sustainable under, its implied authority in relation to navigable waters or under any other aspect of the commerce clause. Instead, it argues that, because, as petitioner erroneously asserts, petitioner has authority to forbid construction, or itself to construct, respondent's project, it can impose such regulations by way of license as it chooses to prescribe, even though they be wholly unrelated to the constitutional authority under which it issues the license, and that such a course would not be "the accomplishment of a forbidden end" (Pet. Br. 130). Quite apart from the fact that petitioner would not have the constitutional authority to construct respondent's project (p. 110 *supra*), the argument is plainly unsound.

Petitioner is not here exercising a proprietary right but only a governmental function; and, when acting solely in that capacity it can impose no regulations by license which it could not have imposed by general statute. It is well settled that the Federal Government cannot, in the guise of conditioning discretionary action even in the field of its admitted authority, exercise authority not delegated, or forbidden, to it by the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 416, 423; *Linder* v. *United States*, 268 U. S. 5, 17; *The Employers' Liability Cases*, 207 U. S. 463, 502; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291. Cf. *Frost Trucking*

*Co.* v. *Railroad Commission*, 271 U. S. 583, 593; *Coyle* v. *Oklahoma*, 221 U. S. 559; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 517. Manifestly any other rule would be the end of constitutional rights and of our constitutional system. Consequently, even if petitioner had authority both to forbid and to construct the project, it could not validly impose regulations unrelated to the constitutional authority upon which must depend its right to act at all in the premises.

The fundamental fallacy in petitioner's argument is made manifest by the alleged analogies upon which petitioner finds itself compelled to rely (Pet. Br. 130-1). We here deal with the constitutional authority of petitioner under the commerce clause. Cases dealing (a) with the authority of the Federal Government, in the exercise of its proprietary rights, to condition the use of public lands; (b) with the authority of a State, exercising both proprietary rights and full police powers, to regulate the use of its highways; (c) with the authority of a State (exercising proprietary rights, authority to define property rights within the State, and full authority to engage in the power business) to regulate the construction of a hydro-electric project in its streams; and (d) with the authority of petitioner to regulate an instrumentality of interstate commerce, are so palpably inapposite that they only reveal more clearly the error in petitioner's contention.[1]

2: *Petitioner's argument that license conditions do not invade the rights of a State or its people.* (Pet. Br. 133-4) Petitioner argues that the license conditions do not invade state rights (a) because the development of water resources

[1] The cases cited by petitioner to which the numbered clauses of the above sentence refer are respectively:

(a) *Arizona* v. *California*, 283 U. S. 423; *Ruddy* v. *Rossi*, 248 U. S. 104; *Oregon & Cal. R.R.* v. *United States*, 238 U. S. 393; (b) *Stephenson* v. *Binford*, 287 U. S. 251; (c) *Fox River Co.* v. *R.R. Commission*, 274 U. S. 651; (d) *United States* v. *Lowden*, 308 U. S. 225; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

is a "national problem" and (b) because, as petitioner asserts, petitioner could build the project or acquire it by eminent domain.[1]

*First*: The development of water resources is no more a "national problem" than the development of all other economic resources of the States. Petitioner cites, and we are aware of, no constitutional grant of authority to regulate "national problems"; and the decisions of this Court conclusively establish that there is none. *Kansas* v. *Colorado*, 206 U. S. 46; *Carter* v. *Carter Coal Co.*, *supra*, 291-2; *United States* v. *Butler*, 297 U. S. 1. The case of *Helvering* v. *Davis*, 301 U. S. 619, dealing with the power to spend (but not to regulate) for the general welfare, is plainly inapposite.

The argument is bottomed upon two fundamental fallacies; the one that the water resources of the several States are owned by petitioner and not by the States, and, the other, that there is some vague or nebulous power in the Federal Government to do anything which it thinks that it could do better than the States.

*Second*: Virginia, like all other States, has full sovereign authority to establish such policy for the development of her water resources as she may from time to time deem best for the health, prosperity and general welfare of her people. See p. 110 *supra*. Whenever the petitioner undertakes to burden, obstruct or prevent the execution of this state policy, it is a palpable invasion of the rights of the State and also of her people, for her people have the constitutional right to develop her water resources without unauthorized interference, regulation or control by petitioner.

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[1] Petitioner's assertion, that both the lower court and respondent conceded that petitioner could build respondent's project or acquire it by eminent domain, is such a clear misstatement that it may hardly be excused on the ground of careless interpretation. (See R. 2891-2, 2921; Resp. Br. below 61-2, 72-3.)

*Third*: Many of the license conditions seek to usurp the ordinary police powers of the State. Manifestly this is an invasion of the rights of the State and of her people, who have a right to be subject only to her regulation in those matters. In all intrastate matters her citizens have a right not to be displaced by the Federal Government and to be free from federal interference, regulation or control.

*Fourth*: The argument that there is no invasion of the rights of the State or of respondent because petitioner might condemn respondent's lands is palpably unsound. While petitioner could condemn respondent's *land* for the construction of *some constitutional federal project*, it could neither condemn the land *for the construction of a power project like respondent's nor condemn respondent's project for carrying on the power business.* The fact that any tract of land in the State might be acquired for some constitutional federal purpose and thereby be removed from the state tax roll does not sustain the conclusion that consequently the petitioner might compel any or all land owners in the State to turn over their property for federal use in commercial ventures not within petitioner's constitutional authority, and that this would not be an invasion of the rights of the State or of her people.

3. *Petitioner's argument that respondent can not now raise the question of validity of the "capture clause".* Petitioner argues that, as to the question whether the "capture clause" is valid, respondent has no right to raise it in this suit (a) because "the prevailing social viewpoint" may be different at the end of the license period, (b) because petitioner's option may never be exercised, and (c) because respondent will have adequate remedies when and if the option is exercised (Pet. Br. 137-9). Each ground of this argument is untenable.

*First*: It is true that by the end of the license term, by amendment to the Constitution, property rights may have been destroyed, but we are considering this case upon the

basis of our constitutional system as it now exists. Moreover, even petitioner in effect concedes that the "capture" clause affects adversely *present day* values of property (Pet. Br. 137) and to that extent involves a taking at and from the very beginning of the license period.

*Second*: Both the tendered license and the mandatory provisions of the Act expressly require a licensee to agree to, and to accept, all of the terms and conditions prescribed by the Act and such further conditions as the Commission may have prescribed in the license (sec. 10(a)). Thereafter the terms of the license may be altered *only* by "mutual agreement" (sec. 6; R. 2675). The license becomes a contract (*Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, 378-9; *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 615), as petitioner itself asserts (Pet. Br. 140, 135). It is established law that one may not obtain relief from his contract upon the ground that he has made a bad bargain and that consequently the contract is confiscatory. *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399; *St. Cloud P. S. Co.* v. *St. Cloud*, 265 U. S. 352; *Trenton* v. *New Jersey*, 262 U. S. 182. It is palpably unsound to suggest that a statute which imposes a present irrevocable contract obligation upon a citizen to turn over his property at a specified future date at the election of petitioner *for an unconstitutional purpose and for a confiscatory price is not being presently applied to him.* One might as well argue that a citizen sentenced to death by a trial court could not appeal because perhaps the governor might commute his sentence. Moreover, one who founds a right upon a statute (as would be the case if a license were accepted) may not challenge its constitutionality in other respects. *Hurley* v. *Commission of Fisheries*, 257 U. S. 223; *United Fuel Gas Co.* v. *R.R. Commission*, 278 U. S. 300.

*Third*: Petitioner's assertion that respondent would have adequate remedies is plainly untenable (Pet. Br. 138-9). The alleged remedy provided by Sections 14 and 313(b)

(which were first created by the amendments of 1935) is much narrower than that provided by the statute under consideration in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, and would not, we think, afford an adequate remedy even if this statutory remedy were open to respondent and did not in any event deal only with a segment of the capture clause.[1] Even if that remedy otherwise extended to every question of law and fact, the objections that petitioner has no constitutional authority to "take over" respondent's project and that the provisions of the capture clause are confiscatory (see pp. 125-7 *supra*) would not be open to petitioner for the reasons stated in the preceding paragraph. Consequently this alleged remedy would consist merely of a right to exact strict performance of one of several unconstitutional phases of the statute of which respondent complains. It is unnecessary to argue the inadequacy of such an alleged remedy.

The argument that a licensee could recover on "implied contract" in a situation where the compensation is fixed by an express contract, as we have shown and as petitioner concedes (Pet. Br. 140) is plainly erroneous; and the cases cited by petitioner (Pet. Br. 139) are plainly inapposite.

It is thus obvious that respondent would have no remedy at all, let alone any adequate remedy, against the unconstitutional exactions of the capture clause if it accepted a license. Of course, petitioner makes no claim that respondent would have any remedy, other than in this proceeding against the other unconstitutional license conditions.

4. *Petitioner's argument that the "capture clause" is valid.* Petitioner does not attempt to meet the insuperable

[1] This alleged remedy relates only to the determination of "net investment" as defined by the statute which is only one of the three unconstitutional features of the option sought to be imposed by petitioner. The other two are the option to take for statutory "fair value" which excludes various elements of constitutional fair value and the adverse taking of a citizen's property for an unconstitutional purpose. (See pp. 125-7, *supra*.)

objection that the "capture clause" would require a citizen to turn his property over to petitioner for a purpose for which petitioner has no constitutional authority to condemn, or otherwise acquire, property. Instead it advances specious arguments which sum up to the effect that, if petitioner had constitutional authority to acquire respondent's project, the "capture clause" would be valid.

(a) *Argument that there is no taking of riparian rights.* (Pet. Br. 136) Petitioner's argument on this point assumes that the project is in a navigable stream or that it would impair navigable capacity and that petitioner has sanctioned an impairment of navigable capacity. Consequently its arguments are inapposite.

However, in addition they are unsound. Petitioner's contention that respondent's property rights are limited to the natural flow of the stream, is plainly erroneous (see p. 112, *supra*); but, even on petitioner's erroneous hypothesis, there would be a taking of respondent's riparian rights to use the natural flow. It is similarly incorrect that power rights may not be developed on a non-navigable stream without federal assent. See pp. 112-16, *supra*.

Even on a navigable stream, the right to develop water power is in the riparian owner and petitioner mis-states when it says (Pet. Br. 136) that respondent does not contend that many of these license conditions are unconstitutional as applied to a project on a navigable stream where no federal property is involved. Respondent has consistently made this contention. Assuming *arguendo* that petitioner had the absolute right to prohibit its development, it is well settled that there is no right to appropriate property without compensation even though the owner could not derive a profit from its use. *Chicago etc. R. Co.* v. *Wisconsin*, 238 U. S. 491, 499. Petitioner may regulate the right of a riparian owner, to develop water power on a navigable stream, *only* in so far as necessary to protect navigation or navigable capacity. *Port of Seattle*

v. *Oregon & W. R. R. Co.*, 255 U. S. 56; *Pike Rapids Power Co.* v. *Railroad*, 99 F. (2nd) 902, 908, cert. den. 305 U. S. 660. Consequently petitioner may not say that a power development would not impair navigable capacity (as it in effect must say under sec. 4(e), 10(a) and 10(c) of the Power Act) but nevertheless forbid it unless the riparian owner will submit to regulations unrelated to the protection of navigable capacity and in excess of its constitutional authority. (See pp. 121-7, *supra.*)

Where the power to prohibit is subject to constitutional limitations, it follows that any conditions which may be attached are subject to like limitations. *Chicago, etc. R. Co.* v. *Wisconsin, supra*, 502. Concededly, petitioner may abate a power project in a navigable stream without compensation as a public nuisance if it in fact obstructs navigable capacity. However, petitioner may not on one hand say that a power project is not an obstruction to navigation and at the same time, because of some assumed arbitrary authority to prohibit such a development, take the development for its own use without compensation. This is precisely what the Power Act attempts to do. (Secs. 4(e) 10(a), 10(c); 14.) Nor may petitioner say that, although a power project creates some impairment of navigable capacity, petitioner will not abate the project as a public nuisance for that reason but will "take" the project without compensation for continued maintenance, operation and use by petitioner. This also the Act, as construed by petitioner, attempts to do.

There is manifest distinction between, on the one hand, the authority of petitioner to abate a project in a navigable stream as a public nuisance and, on the other hand, its lack of any authority to insist that the project shall not be abated as an obstruction to navigation but instead that it shall be converted by petitioner to its own use without compensation on the theory that it could have elected to abate the project. *Monongahela Navigation Co.* v. *United States*,

148 U. S. 312; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (see footnote p. 114, *supra*). It follows that petitioner may not convert a power project to its own use without compensation either on a navigable or non-navigable stream.

(b) *Petitioner's argument that the "capture clause" is not confiscatory.* (Pet. Br. 140-1). The argument that a *contract price* can not be confiscatory hardly supports the claim that it would not be confiscatory to compel a citizen to accept a contract providing compensation which would be confiscatory unless specified by contract. There is plainly no analogy to voluntarily negotiated municipal franchises. No one is compelled to accept the municipal franchise to use its streets on penalty of being barred from use of his own property. Moreover, municipalities in such cases exercise full proprietary rights in their streets, police power and the authority to engage in business. *Fox River Co.* v. *Commission*, 274 U. S. 651 (cited Pet. Br. 28, 130, 141) involves the authority of a State, not the Federal Government, and is plainly inapposite as pointed out by the court below (R. 2921). Apart from the striking differences between the "capture clause" of the Power Act and the terms of the Wisconsin law (Pet. Br. 141), a State, unlike the federal government, not only has the authority to engage in the electric power business if it chooses, but so long as it does not confiscate vested rights, it may establish such law of property, riparian and other, as it chooses. (See p. 110, *supra*.)

(c) *Petitioner's argument based on claim that right to engage in interstate commerce is a privilege.* (Pet. Br. 141-2) Petitioner asserts that the right to engage in interstate commerce is "a privilege" which petitioner, at its whim, may grant, deny or barter upon such terms as it may choose—including the "taking over" of the property of a citizen as a condition of granting him permission to engage in interstate commerce. Truly this would be totalitarianism run riot.

The right to engage in interstate commerce is not "a privilege." *The Employers' Liability Cases*, 207 U. S. 463, 502-3. That right was not created by, and does not spring from, the Federal Government or the Federal Constitution. As Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 211:

> "In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. *This is true. The constitution found it an existing right*, and gave to Congress the power to regulate it."

See also Chief Justice Baldwin in *Hoxie* v. *Railroad*, 82 Conn. 352, 364. Cf. *South Carolina* v. *United States*, 199 U. S. 437, 457-9.

It is a far cry from these fundamental principles to petitioner's present assertion that the Federal Government, standing at the crossroads of commerce like the robber barons of old, may not merely levy tribute upon such commerce but prohibit the manufacturer or farmer from transporting any of his goods in interstate commerce unless he will surrender his factory or farm to the petitioner upon such terms as it may choose to prescribe.

(d) *Petitioner's argument that the "capture clause" is valid as applied to a public utility* (Pet. Br. 142-4).[1] We have previously shown that "net investment" under the *Power Act* would be confiscatory even if "prudent investment" were regarded as a constitutional basis for rate making or condemnation of property. (See pp. 125-8, *supra*.) But, notwithstanding the importance petitioner attaches to the fact that it has recently urged such a basis for rate making, that basis has been consistently rejected by this Court as unconstitutional. *Smyth* v. *Ames*, 169 U. S. 466; *Driscoll*

[1] Petitioner's assertion (Pet. Br. 141, 142) that the project would be valueless at the end of the term even though petitioner has no authority to prohibit its construction or operation (previously shown to be unsound in any event) seems so self-destructive that no discussion is warranted.

v. *Edison Co.*, 307 U. S. 104. And even petitioner has not, so far as we are aware, "urged" that the base for rate-making should be either "prudent investment" or "*fair value*", *whichever should be less at the time*, and in addition that, under such a rule, various elements of constitutional fair value should be excluded from the rate base. Moreover, even on petitioner's erroneous hypothesis, it would hardly follow that a utility's property could be taken for less than fair value; and all of the decisions of this court deny such a possibility. Here, as consistently throughout its brief, petitioner disregards the wide distinction between the obligation which a citizen may voluntarily assume and those which can be validly imposed upon him without compensation by his government (Pet. Br. 143-4). Petitioner also overlooks the fact that dedication of property to *one* public use does not require a citizen to devote his property to *some other* public use to which he has never dedicated it. Here as elsewhere in its arguments on this subject, petitioner disregards the fact that it has no constitutional authority to condemn, or otherwise acquire, respondent's power project and that consequently it may not take respondent's property against its will for any compensation, no matter how large.

## CONCLUSION

For the reasons hereinbefore stated, the decision of the court below, affirming the decision of the District Court, should be affirmed.

Respectfully submitted,

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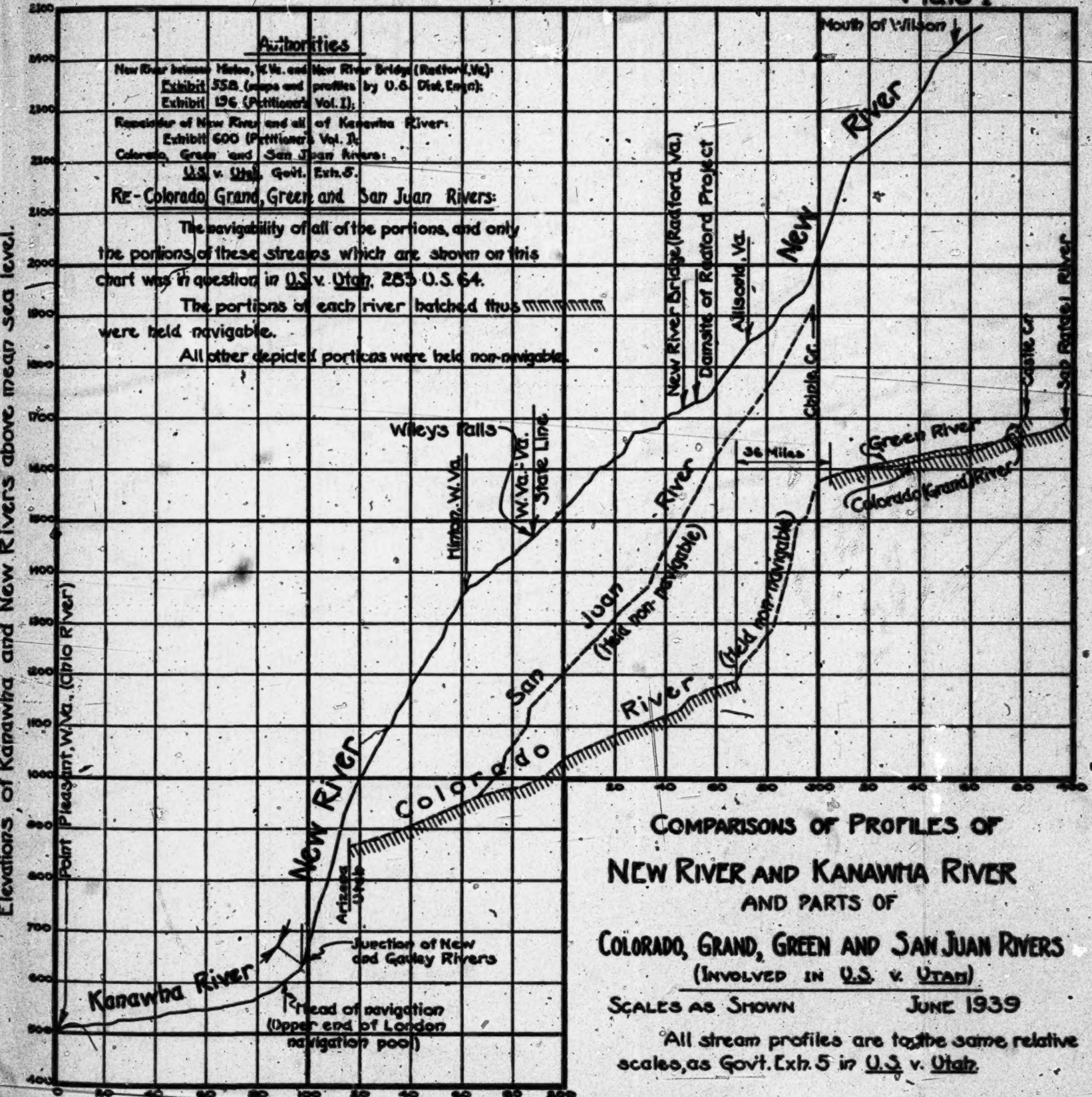
WENDELL W. FORBES,
M. W. BELCHER, JR.,
JOHN L. ABBOT.
*Counsel for Respondent*

August 31, 1940.

Plate I



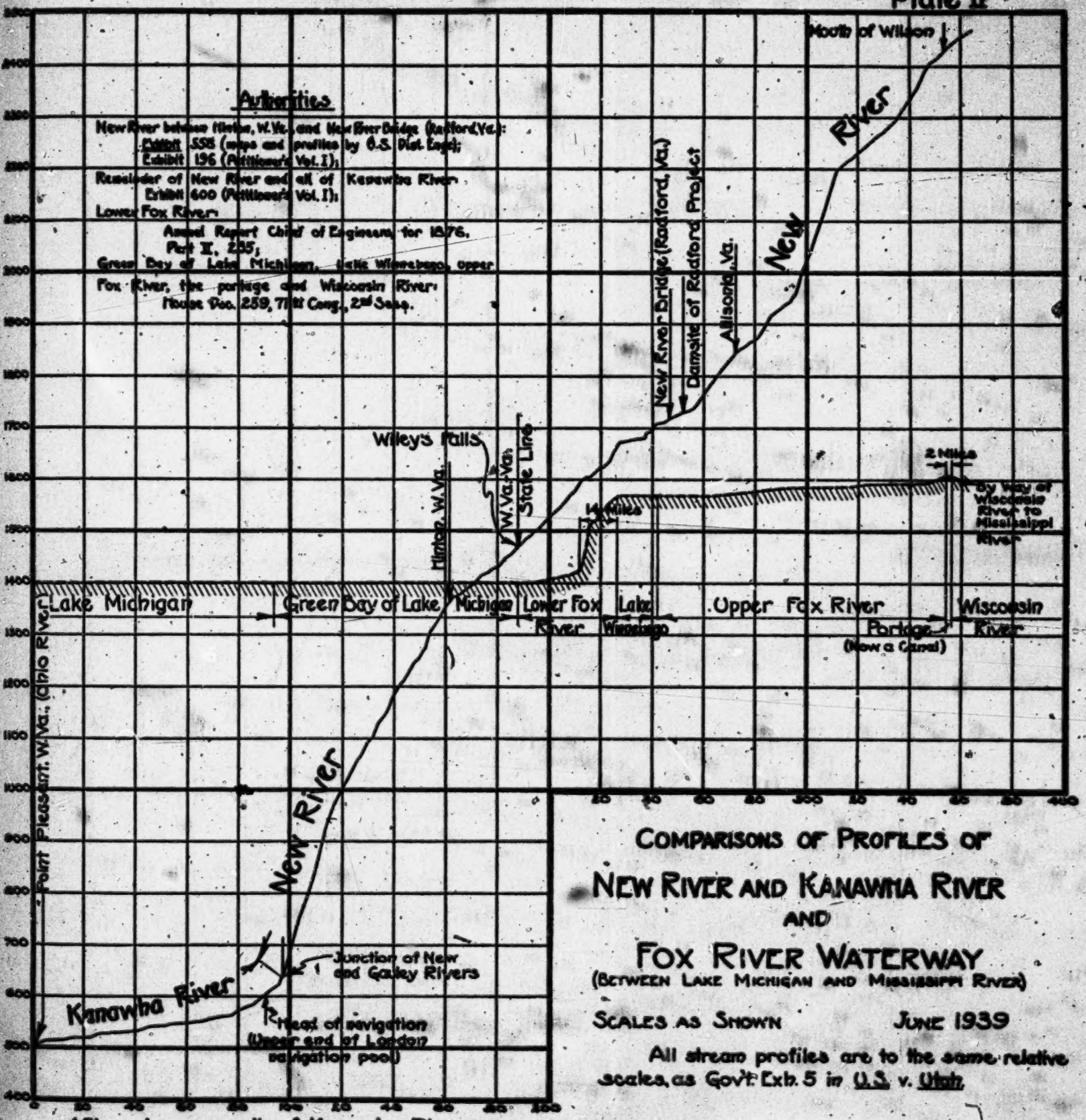

# COMPARISONS OF PROFILES OF NEW RIVER AND KANAWHA RIVER AND PARTS OF COLORADO, GRAND, GREEN AND SAN JUAN RIVERS

(INVOLVED IN U.S. v. UTAH)

SCALES AS SHOWN JUNE 1939

All stream profiles are to the same relative scales, as Govt. Exh. 5 in U.S. v. Utah.

Plate II



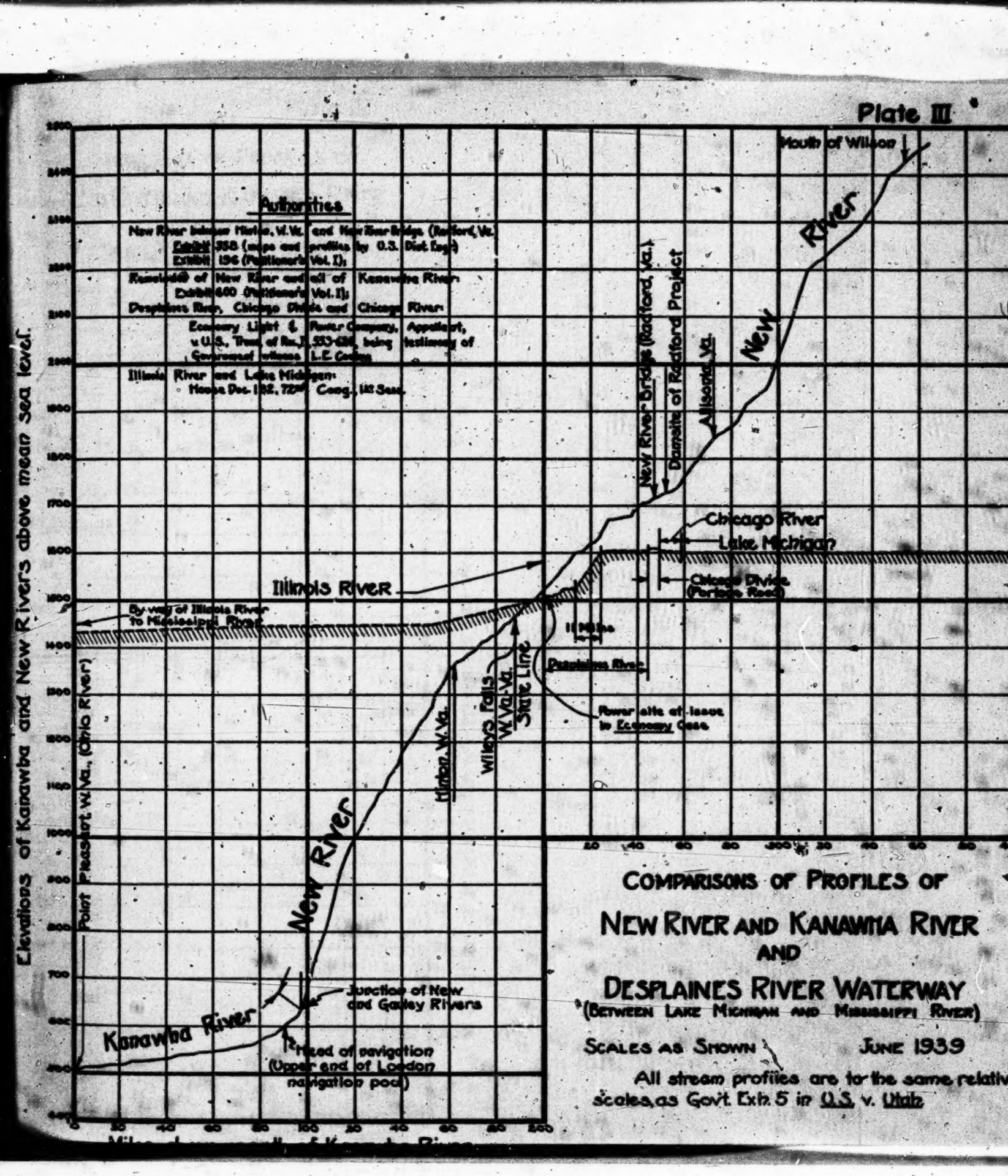

# COMPARISONS OF PROFILES OF NEW RIVER AND KANAWHA RIVER AND FOX RIVER WATERWAY

(BETWEEN LAKE MICHIGAN AND MISSISSIPPI RIVER)

SCALES AS SHOWN JUNE 1939

All stream profiles are to the same relative scales, as Gov't Exb. 5 in U.S. v. Utah

Plate III




# COMPARISONS OF PROFILES OF NEW RIVER AND KANAWHA RIVER AND DESPLAINES RIVER WATERWAY

(BETWEEN LAKE MICHIGAN AND MISSISSIPPI RIVER)

SCALES AS SHOWN — JUNE 1939

All stream profiles are for the same relative scales as Govt. Exh. 5 in U.S. v. Utah

Plate IV

# COMPARISONS OF PROFILES OF NEW RIVER AND KANAWHA RIVER AND TENNESSEE RIVER

(BETWEEN KNOXVILLE, TENN. AND PADUCAH, KY.)

SCALES AS SHOWN AUGUST 1940

All stream profiles are to the same relative scales, as Govt Exb. 5 in U.S. v. Utah

Authorities

| | | |
|---|---|---|
| New River between Hinton, W.Va. and New River Bridge (Radford, Va.) | Exhibit 335 (maps and profiles by U.S. Dist. Engrs. | |
| | Exhibit 196 (Petitioners' | Vol. I). |
| Remainder of New River and all of Kanawha River: | Exhibit 660 (Petitioners' | Vol. I). |
| Tennessee River: | | |
| Muscle Shoals: House Doc. 781, 69th Cong., 1st Sess. | | |
| Remainder of River: House Doc. 328, 71st Cong., 2nd Sess. | | |

Elevations of Kanawha and New Rivers above mean sea level.

Elevations of Tennessee River above mean sea level.

Miles above mouths of Kanawha River and Tennessee River respectively

Mouth of Wilson

New River

New River Bridge (Radford, Va.)

Dam site of Radford Project

Allisonia, Va.

Hinton, W.Va.

Valley Falls W.Va.-Va. State Line

Junction of New and Gauley Rivers

Head of navigation (Upper end of London navigation pool)

Point Pleasant, W.Va. (Ohio River)

Kanawha River

Ky.-Tenn.

Ky.-Tenn.

Paducah, Ky. (Ohio River)

Big Muscle Shoals 14 Miles

Tenn.-Tenn. Chan. Ala.

Tenn.-Tenn. Chan. Ala.

38 Miles

Muscle Shoals

Ala.-Tenn.

Ala.-Tenn.

Tennessee River

Knoxville, Tenn.

COPY. CUT OFF AT BOTTOM